Supreme Court, U.S.
FILED
05-207 AUG 10 2005
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

CELLCO PARTNERSHIP, *et al.*,
Petitioners,

v.

J. DOUGLAS PINNEY, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

ANDREW G. MCBRIDE
HELGI C. WALKER
KATHRYN COMERFORD TODD
JOSHUA S. TURNER
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

JOHN H. BEISNER
Counsel of Record
BRIAN P. BROOKS
SARAH A. GOLDFRANK
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

Counsel for Petitioners Cellco Partnership, Verizon Maryland, Inc., and Verizon Communications Inc.
Additional parties and counsel on inside cover and subsequent pages

KENNETH S. GELLER
DAVID M. GOSSETT
MAYER, BROWN, ROWE
& MAW LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

SEAMUS C. DUFFY
CHRISTOPHER M. ARFAA
DRINKER BIDDLE & REATH LLP
One Logan Square
18th & Cherry Streets
Philadelphia, PA 19103
(215) 988-2700

Counsel for SBC Communications, Inc.

PAUL D. KRAUSE
LAURA N. STEEL
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
1341 G Street, N.W., Suite 500
Washington DC 20015
(202) 626-7660

H. MICHAEL O'BRIEN
JASON P. SULTZER
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
3 Gannett Drive
White Plains, NY 10604
(914) 323-7000

Counsel for SANYO North America Corporation and Matsushita Electrical Corporation of America

CHARLES L. PERRY
ANDREWS KURTH LLP
1717 Main Street, Suite 3700
Dallas, TX 75201
(214) 659-4681

Counsel for Cellular One Group

EUGENE A. SCHOON
TAMAR B. KELBER
SIDLEY AUSTIN BROWN
& WOOD LLP
Bank One Plaza
10 S. Dearborn
Chicago, IL 60603
312-853-7000

Counsel for T-Mobile USA, Inc. Powertel, Inc., Powertel/ Atlanta, Inc. and Powertel PCS, Inc.

JOHN J. NAGLE III
BODIE, NAGLE, DOLINA, SMITH
& HOBBS, P.A.
21 W. Susquehanna Avenue
Towson, MD 21204
(410) 823-1250

Counsel for Communications Electronics, Inc.

DANIEL S. REINHARDT
STEVEN J. HEWITSON
TROUTMAN SANDERS LLP
5200 Bank of America Plaza
600 Peachtree Street, NE
Atlanta, GA 30308-2216
(404) 885-3000

Counsel for Southern Communications Services, Inc.

MAUREEN E. MURPHY
MURPHY & MURPHY, L.L.C.
14 North Rolling Road
Catonsville, MD 21228
(410) 744-4967

Counsel for Baltimore Business Communications, Inc.

FRANCIS A. CITERA
GREENBERG TRAURIG, LLP
77 West Wacker Drive
Suite 2500
Chicago, IL 60601
(312) 456-8413

Counsel for Sony Electronics Inc.

ROBERT B. GREEN
IRWIN GREEN & DEXTER, LLP.
301 W. Pennsylvania Avenue
Towson, MD 21204
(410) 832-0111

Counsel for Cellular Telecommunications & Internet Association

JOHN B. ISBISTER
HAROLD M. WALTER
TYDINGS & ROSENBERG LLP
100 East Pratt Street, Suite 2600
Baltimore, MD 21202
(410) 752-9700

Counsel for Samsung Electronics America, Inc.

PAUL H. VISHNY
PAUL E. FREEHLING
SEYFARTH SHAW LLP
55 East Monroe Street
Suite 4200
Chicago, IL 60603-5803
(312) 346-8000

Counsel for Telecommunications Industry Association

KEVIN B. GETZENDANNER
MATTHEW T. COVELL
ARNALL GOLDEN GREGORY, LLP
171 17th Street NW
Atlanta, GA 30363-1031
(404) 873-8500

Counsel for Mitsubishi Wireless Communications, Inc.

J. STAN SEXTON
DOUGLAS S. BECK
SHOOK, HARDY & BACON, LLP
2555 Grand Blvd.
Kansas City , MO 64108-2168
(816) 474-6550

Counsel for Sprint Spectrum L.P.

QUESTION PRESENTED

Whether the judgment below should be vacated and remanded for reconsideration in light of this Court's intervening decision in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005), which announced a standard for determining the presence of a substantial federal question that is fundamentally inconsistent with the test applied by the Fourth Circuit in this case.

PARTIES TO THE PROCEEDING

Petitioners are Cellco Partnership (doing business as Verizon Wireless), Verizon Communications Inc. (incorrectly named as Verizon Communications, Inc.), Verizon Maryland Inc., Panasonic Corporation of North America (doing business as Matsushita Electrical Corporation of America and incorrectly named as Matsushita Corporation of America), SBC Communications, Inc., Cellular One Group, Voicestream Wireless Corporation (now known as T-Mobile USA, Inc.), Communications Electronics, Inc. (also known as C.E.I., Inc.), Southern Communications Services, Inc. (incorrectly named as Southern Telecom, Inc. also known as Southern Linc), Powertel, Inc., Powertel PCS, Inc., Powertel/Atlanta, Inc., Mitsubishi Wireless Communications, Inc., Baltimore Business Communications, Inc., Sony Electronics Inc., SANYO North America Corporation (incorrectly named as Sanyo North America, Inc. and SANYO Corporation), Samsung Electronics America, Inc., Sprint Spectrum L.P. (doing business as Sprint PCS), Cellular Telecommunications & Internet Association, and Telecommunications Industry Association. Petitioners were defendants in the district court and appellees in the court of appeals.

The following entities were listed as defendants-appellees in the caption to the circuit court's decision below, and are not parties to this petition: Nokia Inc., Nokia Mobile Phones Inc. (formerly known as Nokia Mobile Phones Americas Inc., formerly known as Nokia Mobile Phones Manufacturing USA Inc.), Motorola, Inc. (incorrectly named as Motorola Corporation), Audiovox Communications Corporation, Philips Electronics North America Corporation, QUALCOMM Incorporated (incorrectly named as Qualcomm Corporation), AT&T Corporation, Cingular Wireless LLC (formerly known as Bellsouth Mobility, Inc.), Ericsson Inc. (incorrectly named as Ericsson Wireless Communica-

tions, Incorporated), Kyocera Wireless Corporation as successor in interest to Qualcomm, Nextel Communications of the Mid-Atlantic, Inc., Nextel of New York, Inc., and Nextel South Corp. (each incorrectly named as Nextel Communications, Inc.), NEC America, Inc., Comcast/Metrophone, MCI Worldcom Communications, Inc., Globalstar USA, Inc., SBC Telecom Inc., BellSouth Mobility LLC (successor-in-interest to BellSouth Mobility, Inc.), Cellular Telecommunications Industry Association, Westinghouse Communications, John Does 1-100, Cingular Wireless (also known as Washington Baltimore Cellular Limited Partnership), Nextel Partners Operating Corporation, AB Cellular Holdings, LLC (doing business as LA Cellular, doing business as Los Angeles Cellular Telephone Company), Radiofone Inc., Planet Cellular Communications, Incorporated, Visitor Cellular L.L.C., LGIC Corporation, Bell South Mobility, U.S. West Wireless, L.L.C., U.S. West Communications, Incorporated, GTE Mobilnet of San Diego, Incorporated, GTE Wireless of San Diego, LLC, Cellular Carriers Association of California, and Sprint PCS Limited Partnership.

Respondents are J. Douglas Pinney, Patricia S. Colonell, Francis J. Farina, Crystal Gilliam, Dimitri Mack, and Riedy Gimpelson. Respondents were plaintiffs in the district court and appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Cellco Partnership doing business as Verizon Wireless ("Cellco" or "Verizon Wireless" or "VZW") is a Delaware general partnership with debt in the hands of the public. Cellco has eight partners in total. Six of the partners representing 55% of the interest in Cellco are ultimately owned by Verizon Communications Inc. ("Verizon"); none is publicly held. Two of the partners representing 45% of the interest in Cellco are ultimately owned by Vodafone Group Plc ("Vodafone"). Neither of these partners is publicly held. Verizon is a publicly held Delaware corporation. Vodafone is a publicly held British corporation. Neither Verizon nor Vodafone has a parent company, and no publicly held company has a 10% or greater ownership in either entity.

Verizon Communications Inc., incorrectly named as Verizon Communications, Inc., is a Delaware Corporation. Verizon Communications Inc. does not have a parent company, and no publicly held company owns 10% or more of the stock of Verizon Communications Inc.

Verizon Maryland Inc. is a wholly owned subsidiary of Verizon Communications Inc.

Panasonic Corporation of North America, doing business as Matsushita Electrical Corporation of America and incorrectly named as Matsushita Corporation of America, is a wholly-owned subsidiary of Matsushita Electric Industrial Co., Ltd., a Japanese publicly held company that owns 10% or more of its stock.

SBC Communications, Inc. does not have a parent company, and no publicly held company owns more than 10% of the stock of SBC Communications, Inc.

Cellular One Group is a Delaware general partnership. The current general partners of Cellular One Group are Cellular One L.L.C. (a subsidiary of Western COG Corporation) and Western COG Corporation. Until on or about August 1, 2005, Western COG Corporation was a subsidiary of Western Wireless Corporation. Western COG Corporation is currently a subsidiary of Western Wireless LLC, which is in turn a subsidiary of Alltel Corporation. Neither Cellular One L.L.C. nor Western COG Corporation are publicly-traded. Western Wireless Corporation was a publicly-traded corporation until its merger with Alltel Corporation on or about August 1, 2005. Alltel Corporation is a publicly-traded corporation. As a condition to the approval of the merger between Western Wireless Corporation and Alltel Corporation, the Department of Justice and the Federal Communications Commission have required that Alltel divest certain assets of Western Wireless LLC, including Cellular One Group. A management trustee, David Turetsky, has been appointed to manage the assets which are subject to divestiture.

VoiceStream Wireless Corporation, now known as T-Mobile USA, Inc., is a subsidiary of Deutche Telekom AG. No other publicly-held company owns 10 % or more of VoiceStream Wireless Corporation's stock.

Communications Electronics, Inc., also known as C.E.I., Inc., is a privately held Maryland corporation. There is no parent or publicly held company that owns 10% or more of the corporation's stock. Further, it is not an affiliate or parent of any corporation.

Southern Communications Services, Inc., incorrectly named as Southern Telecom, Inc. a/k/a Southern Linc, is a wholly-owned subsidiary of Southern Company, a publicly traded company organized under the laws of the State of Delaware.

Powertel, Inc., is a wholly-owned subsidiary of T-Mobile USA, Inc. Powertel PCS, Inc., is a wholly-owned subsidiary of Powertel, Inc. Powertel/Atlanta, Inc., is a wholly-owned subsidiary of Powertel PCS, Inc.

Mitsubishi Wireless Communications, Inc. was dissolved in March 2002. Prior to that time, Mitsubishi Wireless Communications, Inc. was wholly-owned by Mitsubishi Electric US Holdings, Inc., a Delaware corporation, which in turn is wholly-owned by Mitsubishi Electric Corporation (of Japan).

Baltimore Business Communications, Inc. is a Maryland corporation and is privately held by three (3) shareholders who are Maryland residents. No other corporation or entity owns stock in Baltimore Business Communications, Inc. It has no parent companies and no subsidiaries or affiliated companies. Accordingly, no publicly held company has a 10% or greater ownership in Baltimore Business Communications, Inc.

Sony Electronics Inc. is an indirect wholly-owned subsidiary of Sony Corporation of America ("SCA"). SCA is an indirect wholly-owned subsidiary of Sony Corporation, which exists under the laws of Japan. Sony Corporation's American Depository Receipts are traded on the New York Stock Exchange. No publicly held company owns 10% or more of the stock of Sony Electronics Inc.

SANYO North America Corporation, incorrectly named as Sanyo North America, Inc. and SANYO Corporation, is a wholly owned subsidiary of SANYO Electric Co., Ltd., a Japanese publicly held company that owns 10% or more of its stock.

Samsung Electronics America, Inc. is a wholly owned subsidiary of Samsung Electronics Co., Ltd., which is a publicly traded entity listed on the Korea Stock Exchange.

Sprint Spectrum L.P. (d/b/a Sprint and Sprint PCS) is a Delaware limited partnership. The general partner of Sprint Spectrum L.P. is Sprint Spectrum Holding Company, L.P., a Delaware limited partnership; the limited partner is MinorCo, L.P., a Delaware limited partnership. The general partner of Sprint Spectrum Holding Company, L.P. is Sprint Enterprises, L.P., a Delaware limited partnership; the limited partners are SWV Six, Inc., a Colorado corporation, SWV One Telephony Partnership, a Delaware partnership, and SWV Two Telephony Partnership, a Delaware partnership. The general partner of MinorCo, L.P. is Sprint Enterprises, L.P.; the limited partners are SWV Six, Inc., SWV One Telephony Partnership and SWV Two Telephony Partnership. The general partner of Sprint Enterprises, L.P. is US Telecom, Inc., a Kansas corporation; the limited partner is UCOM, Inc., a Missouri corporation. The partners of SWV One Telephony Partnership are SWV One, Inc., a Delaware corporation and SWV Two, Inc., a Delaware corporation. The partners of SWV Two Telephony Partnership are SWV Three, Inc., a Delaware corporation, and SWV Four, Inc., a Delaware corporation. The partnerships and corporations above are not themselves publicly traded. All of the partnerships above are indirect, wholly-owned subsidiaries of Sprint Corporation, a Kansas corporation. All of the corporations above are direct, wholly-owned subsidiaries of Sprint Corporation. The stock of Sprint Corporation is publicly traded under the symbol FON. On August 3, 2005, the Federal Communications Commission and the Antitrust Division of the department of Justice approved a proposed merger between Nextel Communications, Inc. and Sprint Corporation. The deal is expected to close in the third quarter of 2005. Under the terms of the proposed transaction, all of the stock of Sprint Corporation is to be owned by Sprint Nextel Corporation.

Cellular Telecommunications & Internet Association

("CTIA") is a trade association incorporated as a non-profit corporation under the laws of the District of Columbia. CTIA has no parent corporation, and no publicly held company has a 10% or greater interest in CTIA.

The Telecommunications Industry Association ("TIA") is a non-profit trade association and has no parent corporation and has issued no stock to the public.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE WRIT 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

American Well Works Co. v. Layne & Bowler, 241 U.S. 257 (1916) 15

Cellular Phone Taskforce v. FCC, 205 F.3d 82 (2d Cir. 2000) 14

EMR Network v. FCC, 391 F.3d 269 (D.C. Cir. 2004) 14

Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 125 S. Ct. 2363 (2005) ..... passim

In re Otter Tail Power Co., 116 F.3d 1207 (8th Cir. 1997) 11, 16

In re Wireless Tele. Radio Frequency Emissions Prods. Liab. Litig., 170 F. Supp. 2d 1356 (J.P.M.L. 2001) 5

In re Zyprexa Prods. Liab. Litig., Nos. 04-MD-01596 (JBW), 05-CV-01549 (JBW), 05-CV-01455 (JBW), 2005 U.S. Dist. LEXIS 13204 (E.D.N.Y. July 1, 2005) 15

Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804 (1986) 3, 4, 11, 15

Ormet Corp. v. Ohio Power Co., 98 F.3d 799 (4th Cir. 1996) 4, 10, 11, 16

Smith v. Kansas City Title Trust Co., 255 U.S. 180 (1921) 15

Torres v. Southern Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997) 11, 16

STATUTES

28 U.S.C. § 1254(1) 2, 3

28 U.S.C. § 1331 ..... passim

28 U.S.C. § 1407 5

28 U.S.C. § 1441 2

TABLE OF AUTHORITIES
(cont.)

Page

28 U.S.C. § 2342(1) 7

47 C.F.R. § 2.1093 5

47 U.S.C. § 151 7

47 U.S.C. § 402(a) 7

OTHER AUTHORITIES

Class Action Fairness Act, Pub. L. No. 109-2 17

Federal Communications Act of 1934 7

H.R. Rep. No. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378) 13

H.R. Rep. No. 104-204 (I) (1995) *reprinted in* 1996 U.S.C.C.A.N. 10, 61 14

In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 11 F.C.C.R. 15123 (1996). 14

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's denial of respondents' motion to remand to state court, App. 1a, is reported at 402 F.3d 430. That court's order denying rehearing and rehearing en banc, App. 96a, is unreported. The memorandum opinion and judgment of the district court on the question of jurisdiction relevant to this petition, App. 48a, is reported at 216 F. Supp. 2d 474. The district court's separate memorandum opinion and judgment regarding the merits of the federal preemption defense and its order of dismissal of the complaint in *Naquin v. Nokia, Inc.*, is reported at 248 F. Supp. 2d 452, and is reprinted as App. B to the separate petition for certiorari filed in *Nokia Inc. v. Naquin*.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2005. That court denied petitioners' timely peti-

---

[1] The Fourth Circuit's reported opinion contains two different judgments – one judgment regarding the absence of federal jurisdiction that applies to four of the five cases on appeal, and a second judgment on the merits of federal preemption that applies only to the fifth case. This petition seeks review only of the Fourth Circuit's judgment on the federal jurisdictional question, which reversed the district court's holding that "substantial federal question" jurisdiction existed in four of these consolidated cases, *i.e.*, *Pinney v. Nokia, Inc.*, No. CCB-01-1456 (D. Md.), *Gimpelson v. Nokia, Inc.*, No. 1-01-CV-1615-WBH (N.D. Ga.), *Gilliam v. Nokia, Inc.*, No. 01CV-4275 (S.D.N.Y.), and *Farina v. Nokia, Inc.*, No. 01-2477 (JRP) (E.D. Pa.). This petition concerns only the jurisdictional issue relevant to the four cases listed above. A separate group of petitioners have filed a petition for certiorari in *Naquin v. Nokia, Inc.*, No. 2:00-cv-02023-ILRL (E.D. La.), seeking plenary review of the Fourth Circuit's ruling on the merits of the federal preemption defense in that case.

tion for rehearing on April 12, 2005. On July 8, 2005, Chief Justice Rehnquist granted petitioners' application for an extension of time in which to file a petition for a writ of certiorari through and including August 10, 2005. Order No. 05-A-25 (Aug. 10, 2005) (Rehnquist, C.J.). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of 28 U.S.C. § 1331, which provides:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

The case also involves an interpretation of 28 U.S.C. § 1441, which provides in relevant part:

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE WRIT

A divided panel of the Fourth Circuit held that a series of nationwide class actions directly attacking the judgment of federal regulators regarding the proper design and operation of every wireless telephone used in this country present no "substantial federal question" sufficient to confer subject matter jurisdiction under 28 U.S.C. § 1331. Yet as the district court noted in denying respondents' motion to remand, "the plaintiffs' suits, though couched in the language of state tort and contract law, have only one goal—to challenge in state court the validity and sufficiency of the federal regulations on radio frequency radiation from wireless phones." App. 54a. Under this comprehensive federal regime, every wireless telephone marketed, sold, or leased in the United States must meet Federal Communications Commission

("FCC") pre-market testing and certification regulations for RF safety and must obtain an "equipment authorization" from the FCC. That authorization constitutes a federal determination that a wireless telephone is not "unreasonably dangerous" and that it is fit for sale nationwide without any further labeling or equipment modifications.

The gravamen of the four class-action complaints at issue in this petition is that FCC-approved wireless telephones – that is, every wireless telephone presently sold, leased, or used in the United States – are "unreasonably dangerous," and "defective products" under state law. In the face of these federal safety testing and authorization requirements, respondents specifically allege inadequate testing and failure to warn of hidden dangers of RF emissions. They seek injunctions providing that FCC-approved wireless telephones cannot be sold or marketed without additional warnings and equipment modifications to mitigate alleged RF dangers. The substantial federal question presented by this blatant attack on a federal regulatory regime is obvious: Can a wireless telephone deemed reasonably safe by federal law and therefore authorized for nationwide use be declared "unreasonably dangerous" under state law? As Senior Judge Kiser recognized in dissent, these cases "cannot be resolved without proving that the FCC's RF radiation emission standards are too high to protect the consuming public," App. 43a, and this conclusion "stems from a reading of plaintiffs' complaint—not from any defense that the defendants may assert." *Id.*

The Fourth Circuit panel majority arrived at a contrary result by doing exactly what this Court subsequently warned against in its decision in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005). The panel majority improperly read this Court's decision in *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804 (1986), as establishing a wooden test for the presence of a substantial federal question, excluding any consideration of the complete over-

lap in this case between plaintiffs' claims and the validity and sufficiency of a federal regulatory regime. *See* App. 19a. But less than two months later in *Grable*, this Court made clear that "*Merrell Dow* disclaimed the adoption of any bright-line rule, as when the Court reiterated that 'in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.'" *Grable*, 125 S. Ct. at 2370 (quoting *Merrell Dow*, 478 U.S. at 810). Indeed, as Senior Judge Kiser pointed out, App. 46a, the panel majority abandoned the Fourth Circuit's prior flexible approach to evaluating the presence of a substantial federal question as applied in *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 807 (4th Cir. 1996). In fact, this Court made a positive reference to *Ormet* as lying on the right side of the circuit conflict resolved by the unanimous decision in *Grable*. *See Grable* 125 S. Ct. at 2366, n2. The Fourth Circuit has thus shifted jurisprudential ground on the substantial federal question issue.

Because the Fourth Circuit's approach to the substantial federal question inquiry is irreconcilable with the approach mandated by *Grable*, and because it denies a federal forum without consideration of the factors identified in *Grable* itself, this Court should grant the petition, vacate the judgment of the court below, and remand these four consolidated cases for reconsideration of the substantial federal question issue in light of this Court's decision in *Grable*.

STATEMENT OF THE CASE

In 2000 and 2001, respondents filed a series of lawsuits in state court that had all the hallmarks of a federal regulatory proceeding. Acting on behalf of a purported class of wireless telephone purchasers, and acknowledging that wireless telephones are licensed for sale by the FCC pursuant to a federal RF emissions regulation, respondents allege that FCC-approved phones are "unreasonably dangerous" under

various state tort principles. Because both Congress and the FCC have long insisted on federal primacy in the area of wireless telecommunications, petitioners removed the four actions that are the subject of this petition to federal court pursuant to 28 U.S.C. § 1331. In addition, because the complaints were virtually identical, petitioners petitioned the Judicial Panel for Multidistrict Litigation (the "JPML") to consolidate and transfer the cases to a single federal judge pursuant to 28 U.S.C. § 1407. On October 31, 2001, the JPML granted petitioners' motion for transfer and consolidation, directing that all pre-trial activity in these and other constituent actions take place in the District of Maryland. *See In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 170 F. Supp. 2d 1356 (J.P.M.L. 2001).

1. As both the district court and the dissenting judge below agreed, a challenge to the validity and sufficiency of a comprehensive federal regulatory regime is embedded in every one of respondents' putative state "tort" or "defective product" claims. For example, the complaints allege that petitioners "failed to conduct appropriate, reasonable and adequate testing" of RF emissions from wireless telephones, App. 125a, despite the fact that the telephones concededly satisfied the RF emissions testing requirements set forth in FCC regulations. *See* 47 C.F.R. § 2.1093. The complaints further acknowledge that petitioners "are granted licenses by the FCC" to broadcast at specified radio frequencies, App. 122a-123a, and that the wireless telephones sold by petitioners are subject to FCC equipment authorization requirements. App. 123a. The complaints went on to allege that petitioners acted "dishonest[ly]" in "stat[ing] that cell phones fall within the safety standards of the . . . FCC . . . ." App. 127a-128a. In short, the complaints made clear on their face that respondents' claims were premised on the sale of wireless telephones that had been tested pursuant to FCC regulations, found to satisfy RF emissions limitations imposed by FCC regulations, and authorized for sale by the FCC. The

complaints also make allegations of false, fraudulent and misleading statements to the public, to standard-setting bodies, and hence to federal regulators that constitute "fraud on the agency" allegations regarding the scientific data relied upon by the FCC. Indeed, many of the allegations of these four complaints directly parallel the challenges raised to the FCC rules in two petitions for review in federal court, both of which were denied. *See infra*, n. 2.

In sum, the complaints made clear on their face that respondents' claims were premised on the sale of wireless telephones that had been tested pursuant to FCC regulations, found to satisfy RF emissions limitations imposed by FCC regulations, and authorized for sale by the FCC.

The complaints also advanced liability theories that directly challenged the validity and sufficiency of the federal regulations pursuant to which petitioners' wireless telephones were licensed for sale. For example, the complaints alleged claims for strict product liability under both design and manufacturing defect theories, asserting that FCC-compliant telephones authorized for sale under federal regulations were "unreasonably dangerous when used in the manner intended by" petitioners. App. 139a. In addition, the complaints alleged claims for breach of the implied warranty of merchantability, asserting that FCC-approved wireless telephones were not "safe and fit for [] use" unless equipped with additional safety devices not required under the FCC equipment authorization regulations. App. 144a. In these and other respects, respondents' complaints raised an inescapable federal question: whether wireless telephones that have been tested pursuant to FCC regulations, found to satisfy RF emissions limitations imposed by FCC regulations, and authorized for sale as "safe" by the FCC are nonetheless unreasonably dangerous.

While the respondents' complaints evidenced on their face numerous connections to federal law, they did not out-

line a tort claim that would be recognizable under traditional state common-law principles. The complaints alleged only that petitioners' wireless telephones posed a "health risk" or caused undefined "biological effects," on the basis of which respondents sought various remedies to achieve what would amount to a rebalancing of the risk factors considered as part of the FCC's RF emissions rulemaking. App. 123a-124a. Indeed, the purported classes defined in the complaints include only those wireless telephone purchasers "who have *not* been diagnosed with a brain related tumor or cancer of the eye." App. 119a-120a (emphasis added). Thus, these are not traditional tort cases to redress costs associated with a specific injury or disease. Instead, they are tantamount to a third petition for review of the FCC's RF emissions rulemaking masquerading in the language of state tort law and filed in courts that have no jurisdiction to review or set aside federal regulations, and thus raise a federal question that is by definition substantial. *Cf.* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a).

2. The district court reviewed the complaints and concluded that subject matter jurisdiction existed under the substantial federal question doctrine because respondents' theories of liability amounted to a challenge to the validity and sufficiency of federal telecommunications regulations. Considering such factors as Congress's assertion in the Federal Communications Act of 1934 ("FCA"), 47 U.S.C. § 151, of "federal control over all interstate wire and radio communications systems," App. 60a, and the FCC's "exclusive authority" to "issue[] licenses and set the technical standards for wireless telecommunications," App. 61a, the district court reasoned:

> Removal might not be warranted if plaintiffs could prevail without a court evaluating the validity and sufficiency of the federal [RF] standards. . . . Here, however, the central premise of each count of each complaint is that federal safety regulations governing wire-

> less hand-held phones permit the sale of a product that is unreasonably dangerous to consumers. The only way a court can resolve this dispute and possibly grant plaintiffs the remedy they seek is for it to pass judgment on the validity of the federal RF standards.

App. 77a.

A divided Fourth Circuit panel reversed. The majority did not dispute that there was a substantial connection between respondents' claims and the federal RF regulations, pursuant to which petitioners' phones were authorized for sale. *See* App. 22a-23a. Nor did the panel deny that FCC regulations struck a balance between health and safety concerns and the efficiency of the wireless network. The panel majority nonetheless rejected the district court's jurisdictional conclusion based on the proposition that the court "should have considered only whether a disputed question of federal law is an essential element of one of the well-pleaded state claims." App. 18a-19a. Ignoring the fact that every complaint allegation was directed at FCC-approved wireless phones and sought to reverse a federal determination that these devices are not "unreasonably dangerous," the panel simply recited the elements of the state law claims and professed the inability to find an embedded federal question. The Fourth Circuit further held as a matter of law that, where compliance with a federal regulation is "only one factor in assessing" whether liability exists under state law, jurisdiction cannot exist under 28 U.S.C. § 1331. App 20a.

Senior Judge Kiser dissented, disagreeing with the panel majority's narrow reading of the substantial federal question doctrine. In the dissent's view, the undeniable direct connection between respondents' claims and the federal RF regulation was sufficient to support substantial federal question jurisdiction. In response to the panel majority's assertion that substantial federal question jurisdiction exists only when a specifically identified state-law element turns on federal law, Judge Kiser stated:

> The plaintiffs are not trying this case in a vacuum. The FCC has enacted a uniform, nationwide regulatory scheme pertaining to wireless telephones which is the result of a thorough and complex rule-making process. The final rules reflect what the FCC believes will maintain the proper balance between the interest in promoting wireless communication throughout the country and the interest in protecting the health and safety of all consumers. The plaintiffs will not be able to ignore these standards. In proving their prima facie case for each claim, the plaintiffs will have to prove the unreasonableness of the RF radiation emitted by FCC-compliant wireless telephones. The plaintiffs will thus have to establish that the FCC standards are insufficient. It is well-settled that a suit to invalidate a federal regulation arises under federal law.

App. 43a-44a.

On June 13, 2005, two months after the Fourth Circuit denied a petition for rehearing, this Court handed down its decision in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005). The Court in *Grable* clarified that "bright-line rule[s]" – such as the Fourth Circuit's directive that the district court "should have considered only" a single factor – are inappropriate "in exploring the outer reaches of [28 U.S.C.] § 1331" under the substantial federal question doctrine. *Id.* at 2370.

REASONS FOR GRANTING THE WRIT

THIS COURT'S INTERVENING DECISION IN *GRABLE* FUNDAMENTALLY ALTERS THE ANALYSIS UNDERLYING THE FOURTH CIRCUIT'S JURISDICTIONAL RULING.

The Court should grant certiorari, vacate the judgment of the Fourth Circuit, and remand to give the court of appeals an opportunity to address the jurisdictional issue in light of

this Court's intervening decision in *Grable*. Prior to *Grable*, the courts of appeals were divided on the proper approach to ascertaining whether a substantial federal questions was embedded in a state cause of action. Some courts had adopted mechanistic rules to determine the existence of substantial federal question jurisdiction. The Court granted certiorari in *Grable* to address one example of such a mechanistic rule – whether a jurisdictionally sufficient substantial federal question could be founded upon a federal statute that does not provide a private right of action. The Seventh Circuit had held that there can be no substantial federal question jurisdiction absent a federal private right of action, but the Fourth and Sixth Circuits had disagreed. This Court rejected the Seventh Circuit's approach and, in doing so, generally "disclaimed the adoption of any bright-line rule" for substantial federal question. 125 S. Ct. at 2370.

Grable alters the law of substantial federal question jurisdiction precisely because it instructs courts to consider the full range of connections between a given plaintiff's state-law claims, on the one hand, and related federal laws and regulations, on the other. After *Grable*, "the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 2372. *Grable*'s mandate of a "contextual enquiry," *id.* at 2370, does not authorize courts to employ any single, mechanical test for ascertaining whether a federal issue has been "raised" by a state complaint, and preexisting case law makes clear that any mechanical test for the existence of a federal issue is inappropriate. In the *Ormet* case cited by this Court in *Grable*, for example, a breach-of-contract claim was found to raise a substantial federal question because the contractual interests at issue were tradable emissions permits created by the federal Clean Air Act, despite the fact that neither the offer, the acceptance, nor the consideration turned on

federal law. *See Ormet*, 98 F.3d at 807. In *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), the Fifth Circuit found negligence and nuisance claims to raise a substantial federal question involving the federal common law of foreign relations because the dispute involved the "vital economic interests" and "sovereign interests" of a foreign government, despite the fact that none of the elements of duty, breach of duty, proximate cause, cause in fact, or damages turned on federal law. *Id.* at 543. In *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997), the Eighth Circuit found an injunction claim against an electric utility to raise a substantial federal question because the dispute asked whether a utility that supplied electricity to Indian country was required to obtain a permit from the state public service commission, and that in turn required an examination of "treaty rights, acts of Congress, or inherent tribal sovereignty" – even though no element of any state law claim turned on federal law. *Id.* at 1214.

In short, *Grable* makes clear that in determining whether a state complaint raises a federal question, it is error for a court to apply a bright-line rule that gives conclusive weight to one factor (such as whether a particular element of a state law claim turns on federal law) and excludes from consideration other factors in determining the existence of substantial federal question jurisdiction. Indeed, *Grable* reaffirmed this Court's prior ruling in *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804 (1986), which "disclaimed the adoption of any bright-line rule" for determining the existence of federal question jurisdiction. *Id.* at 2370. *Grable* reemphasized the need for "sensitive judgments about congressional intent" on matters concerning federal question jurisdiction. *Ibid.* A "bright line" test is inconsistent with the "contextual enquiry" required by the Constitution. *Ibid.*

That holding has an obvious and direct impact on the reasoning employed by the panel majority in this case, which gave dispositive weight to a single factor – the absence of a

particular element of a state-law cause of action that was alleged to turn on a violation of federal law – to the exclusion of all other connections to FCC regulations, no matter how substantial.

First, without the benefit of *Grable*, the court below employed a bright-line rule that rejects substantial federal question jurisdiction unless "a disputed issue of federal law is an essential element of at least one of the plaintiffs' state claims." App. 24a. The Fourth Circuit's bright-line rule is directly analogous to the Seventh Circuit's rule rejected in *Grable* itself. In *Grable*, the Seventh Circuit held that a complaint alleging a violation of federal tax rules is not subject to substantial federal question jurisdiction because the relevant tax rules did not provide a federal private right of action; this Court reversed, holding that courts must consider the importance of uniform interpretations of federal law, the centrality of the federal issue to the underlying state claims, the overall effect on the federal-state division of labor, and other relevant considerations. Here, the Fourth Circuit held that a complaint alleging that wireless telephones authorized for sale by the FCC after being found to satisfy FCC RF emissions limits based on testing pursuant to FCC testing regulations is not subject to substantial federal question jurisdiction because respondents did not expressly articulate a violation of federal law as one of the elements of their state-law claims.

Second, under *Grable*, the Fourth Circuit should have looked at whether respondents' claims "necessarily raise a stated federal issue, disputed and substantial," not narrowly focus on whether the federal issue is "an essential element" of one of their claims. Because respondents' own complaints acknowledge that the wireless telephones sold by petitioners had been tested according to FCC regulations, had satisfied express FCC RF emissions regulations, and consequently had been authorized for sale by the FCC, respondents' obligation to show that their FCC-authorized wireless

telephones nonetheless were "unreasonably dangerous" necessarily entails an inquiry into the reasonableness of the FCC's RF testing and emissions limitation regulations as the principal, if not only, substantive issue in the case. Under *Grable*, that inquiry likely would be sufficient to establish substantial federal question jurisdiction.

Third, the Fourth Circuit held that substantial federal question jurisdiction cannot exist where compliance with a federal regulation is "only one factor in assessing" whether liability exists under state law – no matter how significant that factor is. App. 20a. Yet *Grable* directs courts to evaluate the qualitative significance of the federal issue in the case and, particularly, the importance of resolving that issue on a uniform basis in federal court – not simply to weigh the number of federal issues against the number of state issues. *See* 125 S. Ct. at 2368. The scope of federal regulation of wireless telecommunications in general, and of RF emissions in particular, reveals a compelling federal concern with uniform regulation of this peculiarly national area of commerce. As the district court recognized, the purposes of federal primacy over technical wireless standards are to ensure compatibility of equipment and signal quality necessary for a national wireless network, *see* App. 61a-62a, and to "further encourage the rapid deployment of uniform wireless services" and "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." App. 62a (quoting H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587). In the 1996 Telecommunications Act, Congress specifically identified nationally uniform RF emissions standards as a legislative objective, with the relevant House committee stating that "it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible. Such requirements will ensure an appropriate balance in

policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services." H.R. Rep. No. 104-204, pt. 1 (1995) *reprinted in* 1996 U.S.C.C.A.N. 10, 61. The FCC's RF emissions regulations carry out Congress's demand for a national uniform RF emissions standard, and "represent a consensus view of the federal agencies responsible for matters relating to the public safety and health." *In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123, ¶ 2 (1996). The validity and sufficiency of these standards should be resolved in federal court.[2]

The Fourth Circuit's holding is perhaps best explained by the panel majority's discomfort with a jurisdictional principle that "does not suggest a standard for determining when a connection [with a federal regulatory regime] is sufficient to render removal proper[.]" App. 23a. But, as noted above, the central holding of *Grable* is that no bright-line standard is either required or possible given the nature of the substantial federal question doctrine. In essence, the Fourth Circuit's refusal to acknowledge a federal question embedded in the pleading of a state cause of action is reminiscent of the narrow approach advocated by Justice Holmes in dissent in *Smith*. But *Grable* makes clear that:

> *Merrell Dow* cannot be read whole as overturning decades of precedent, as it would have done by effectively adopting the Holmes dissent in *Smith* [*v. Kansas City Title Trust Co.*, 255 U.S. 180 (1921)]...and converting

[2] In fact, the validity and sufficiency of the FCC's RF emissions regulation have *twice* been resolved in federal court. In both *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000) and *EMR Network v. FCC*, 391 F.3d 269 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2925 (2005), other courts of appeals considered and rejected arguments – like respondents' arguments here – that the RF emissions of FCC-approved wireless telephones are unreasonably dangerous to the public health.

> a federal cause of action from a sufficient condition for federal-question jurisdiction into a necessary one...*Merrell Dow*, then, did not toss out, but specifically retained the contextual inquiry that had been *Smith*'s hallmark for over 60 years. At the end of *Merrell Dow*, Justice Holmes was still dissenting.

125 S. Ct. at 2369-70. The inconsistency between *Grable* and the Fourth Circuit's approach in this respect is highlighted by the fact that the Fourth Circuit cited Justice Holmes's opinion in *American Well Works Co. v. Layne & Bowler*, 241 U.S. 257 (1916) (App. 12a), but did not mention *Smith* at all.

Grable alters the analytic framework applied by the Fourth Circuit sufficiently to create a reasonable probability that, if given the opportunity for reconsideration, the Fourth Circuit would reach a different result. At a minimum, the Fourth Circuit should be given the opportunity to reconsider its 2-1 decision in the context of *Grable* so that this Court has the benefit of the Fourth Circuit's analysis in the event further proceedings become necessary.[3]

This course is particularly appropriate here because of the great legal and practical consequences of leaving the Fourth Circuit's jurisdictional decision unreviewed. Legally, the Fourth Circuit's ruling creates a circuit conflict, because other courts of appeals have not accepted the notion that a substantial connection between state-law claims and a federal regulatory regime cannot support removal absent a showing that a particular element of a state-law claim neces-

---

[3] A recent post-*Grable* jurisdictional decision in a multidistrict proceeding involving product safety claims further demonstrates the probability that the jurisdictional issue here would be decided differently if reconsidered in light of *Grable*. *See In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-01596 (JBW), 05-CV-01549 (JBW), 05-CV-01455 (JBW), 2005 U.S. Dist. LEXIS 13204, at *12-13 (E.D.N.Y. July 1, 2005) (denying remand in multidistrict pharmaceutical product liability action based on *Grable*).

sitates resolution of a federal question. *Compare, e.g., Torres*, 113 F.3d 540 (affirming subject matter jurisdiction under substantial federal question doctrine because of connection between plaintiffs' claims and federal common law of foreign relations, where no specific element of plaintiffs' state-law claims turned on specific federal question); *In re Otter Tail Power Co.*, 116 F.3d 1207 (to same effect in context of law of Indian tribal lands). Indeed, in this respect, the decision below conflicts with an earlier Fourth Circuit decision – *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996) – that this Court endorsed in *Grable*. *See Grable*, 125 S. Ct. at 2366 n.2. Reconsideration in light of *Grable* could resolve this apparent circuit conflict without the need for further proceedings in this Court.

The Fourth Circuit's jurisdictional ruling also portends significant practical problems. Left unreviewed, the decision below requires a substantial portion of the nation's wireless telecommunications industry to litigate technical standards for federally regulated wireless handsets in multiple different state courts around the country, without the benefit of the multidistrict litigation procedures that are available in the federal system to coordinate multiple similar class actions. That result is untenable in the context of federal telecommunications regulations that were implemented with the express goal of achieving uniformity in the nation's wireless telecommunications network. Indeed, as the Fourth Circuit's *Ormet* decision recognized, in certain federal regulatory regimes, "the need for uniformity becomes a substantial federal interest, justifying the exercise of jurisdiction by federal courts." *Ormet*, 98 F.3d at 807. Again, reconsideration in light of *Grable* could avoid the practical morass created by duplicative industry-wide litigation in multiple different state courts on a matter of national significance.[4]

---

[4] While the Class Action Fairness Act, Pub. L. No. 109-2, liberalizes the removal requirements for interstate class actions, that statute applies only

In short, GVR is appropriate and important in this case. The Fourth Circuit resolved a controversial jurisdictional issue in a split decision that was issued just weeks before this Court's *Grable* decision clarified the proper analysis for substantial federal question jurisdiction. GVR will ensure that the Fourth Circuit has the opportunity to reconsider the matter under the proper standard, and will ensure that this Court has the benefit of the Fourth Circuit's analysis of this case under the *Grable* standard should further proceedings become necessary.

---

to actions commenced on or after February 18, 2005. Thus, absent reconsideration by the court of appeals, there is no practical vehicle to ensure that these actions are resolved on a coordinated basis in federal court.

CONCLUSION

The Court should grant the writ of certiorari, vacate the judgment, and remand the case for reconsideration in light of *Grable*.

Respectfully submitted,

JOHN H. BEISNER
Counsel of Record
BRIAN P. BROOKS
SARAH A. GOLDFRANK
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

ANDREW G. MCBRIDE
HELGI C. WALKER
KATHRYN COMERFORD TODD
JOSHUA S. TURNER
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

Counsel for Petitioners Cellco Partnership, d/b/a Verizon Maryland, Inc., and Verizon Communications Inc.

KENNETH S. GELLER
DAVID M. GOSSETT
MAYER, BROWN, ROWE
& MAW LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

SEAMUS C. DUFFY
CHRISTOPHER M. ARFAA
DRINKER BIDDLE & REATH LLP
One Logan Square
18th & Cherry Streets
Philadelphia, PA 19103
(215) 988-2700

Counsel for SBC Communications, Inc.

PAUL D. KRAUSE
LAURA N. STEEL
WILSON, ELSER, MOSKOWITZ,
EDELMAN, & DICKER LLP
1341 G Street, N.W., Suite 500
Washington DC 20015
(202) 626-7660

H. MICHAEL O'BRIEN
JASON P. SULTZER
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
3 Gannett Drive
White Plains, NY 10604
(914) 323-7000

Counsel for SANYO North America Corporation and Matsushita Electrical Corporation of America

CHARLES L. PERRY
ANDREWS KURTH LLP
1717 Main Street, Suite 3700
Dallas, TX 75201
(214) 659-4681

Counsel for Cellular One Group

EUGENE A. SCHOON
TAMAR B. KELBER
SIDLEY AUSTIN BROWN
& WOOD LLP
Bank One Plaza
10 S. Dearborn
Chicago, IL 60603
312-853-7000

Counsel for T-Mobile USA, Inc. Powertel, Inc., Powertel/ Atlanta, Inc. and Powertel PCS, Inc.

JOHN J. NAGLE III
BODIE, NAGLE, DOLINA, SMITH
& HOBBS, P.A.
21 W. Susquehanna Avenue
Towson, MD 21204
(410) 823-1250

Counsel for Communications Electronics, Inc.

MAUREEN E. MURPHY
MURPHY & MURPHY, L.L.C.
14 North Rolling Road
Catonsville, MD 21228
(410) 744-4967

Counsel for Baltimore Business Communications, Inc.

ROBERT B. GREEN
IRWIN GREEN & DEXTER, LLP.
301 W. Pennsylvania Avenue
Towson, MD 21204
(410) 832-0111

Counsel for Cellular Telecommunications & Internet Association

DANIEL S. REINHARDT
STEVEN J. HEWITSON
TROUTMAN SANDERS LLP
5200 Bank of America Plaza
600 Peachtree Street, NE
Atlanta, GA 30308-2216
(404) 885-3000

Counsel for Southern Communications Services, Inc.

FRANCIS A. CITERA
GREENBERG TRAURIG, LLP
77 West Wacker Drive
Suite 2500
Chicago, IL 60601
(312) 456-8413

Counsel for Sony Electronics Inc.

JOHN B. ISBISTER
HAROLD M. WALTER
TYDINGS & ROSENBERG LLP
100 East Pratt Street, Suite 2600
Baltimore, MD 21202
(410) 752-9700

Counsel for Samsung Electronics America, Inc.

PAUL H. VISHNY
PAUL E. FREEHLING
SEYFARTH SHAW LLP
55 East Monroe Street
Suite 4200
Chicago, IL 60603-5803
(312) 346-8000

Counsel for Telecommunications Industry Association

KEVIN B. GETZENDANNER
MATTHEW T. COVELL
ARNALL GOLDEN GREGORY, LLP
171 17th Street NW
Atlanta, GA 30363-1031
(404) 873-8500
Counsel for Mitsubishi Wireless Communications, Inc.

J. STAN SEXTON
DOUGLAS S. BECK
SHOOK, HARDY & BACON, LLP
2555 Grand Blvd.
Kansas City , MO 64108-2168
(816) 474-6550

Counsel for Sprint Spectrum L.P.

APPENDIX

APPENDIX TABLE OF CONTENTS

Pinney v. Nokia, Inc.,
402 F.3d 430 (4th Cir. 2005).....1a
Pinney v. Nokia, Inc.,
216 F. Supp. 2d 474 (D. Md. 2002).....48a
Pinney v. Nokia, Inc.,
No. 03-1433 (4th Cir. April 12, 2005).....96a
Pinney v. Nokia, Inc.,
Civil Action No: 24-C-01-1897 (Md. Cir. Ct.).....100a
Farina v. Nokia, Inc.,
No. 002527 (Pa. Common Ct.).....158a
Gillian v. Nokia, Inc.,
Index No. 15692-2001 (N.Y. Sup. Ct.).....197a
Gimpelson v. Nokia, Inc.,
Civil Action No. 2001CV38932 (Ga. Sup. Ct.).....235a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. DOUGLAS PINNEY, M.D.; PATRICIA S. COLONELL, individually and on behalf of all others similarly situated; FRANCIS J. FARINA, individually and on behalf of all those similarly situated; GARRETT J. NAQUIN; RONALD LEBLANC; JUDITH A. KAUFMAN; ASHER RUBENSTEIN; CRYSTALL GILLIAM; DIMITRI MACK; RIEDY GIMPELSON, individually and on behalf of all others similarly situated; SARAH DAHLGREN, on behalf of herself and all others similarly situated; LINDA BARRELL; BLAYNE MINOGUE; BRIAN LANE BARRETT; DIANA BARRETT; DAVID C. KELLER; MARSHA L. KELLER, Plaintiffs-Appellants,

v.

NOKIA, INCORPORATED, a/k/a Nokia Mobile Phones, Incorporated, a/k/a Nokia Corporation; NEC AMERICA, INCORPORATED; ERICSSON WIRELESS COMMUNICATIONS, INCORPORATED, a/k/a Ericsson, Incorporated; SPRINT PCS LIMITED PARTNERSHIP, a/k/a Sprint PCS, a/k/a Sprint Spectrum, LLP, a/k/a Sprint Spectrum; AUDIOVOX COMMUNICATIONS CORPORATION; NEXTEL COMMUNICATIONS, INCORPORATED, a/k/a Nextel Communications of the Mid-Atlantic, Incorporated, a/k/a Nextel Partners, Incorporated, a/k/a Nextel; MATSUSHITA CORPORATION OF AMERICA, a/k/a Panasonic Corporation; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION; QUALCOMM INCORPORATED; SAMSUNG ELECTRONICS

AMERICA, INCORPORATED, a/k/a Samsung Electronics; SANYO NORTH AMERICA, INCORPORATED, a/k/a Sanyo Business Systems Corporation, a/k/a Sanyo North America Group; SONY ELECTRONICS, INCORPORATED; AT&T CORPORATION, a/k/a AT&T; VERIZON MARYLAND, INCORPORATED, a/k/a Verizon, a/k/a Verizon Wireless, formerly known as Bell Atlantic Maryland, Incorporated; VERIZON COMMUNICATIONS, INCORPORATED, formerly known as Bell Atlantic Corporation; VERIZON WIRELESS, a/k/a Nynex, a/k/a Bell Atlantic Nynex, a/k/a Bell Atlantic Mobile, Incorporated, a/k/a Bell Atlantic NYNEX Mobile; CELLCO PARTNERSHIP, d/b/a Verizon Wireless, formerly known as Bell Atlantic NYNEX Mobile, formerly known as Bell Atlantic Mobile; CINGULAR WIRELESS, LLC, formerly known known as Bell South Mobility, Incorporated, a/k/a Southwestern Bell Wireless, formerly known as Southwestern Bell Mobile Systems, Incorporated; CINGULAR WIRELESS, a/k/a Washington/Baltimore Cellular Limited Partnership; SBC COMMUNICATIONS, INCORPORATED; CELLULAR ONE GROUP, a/k/a Cellular One; VOICESTREAM WIRELESS CORPORATION; C.E.I., INCORPORATED, a/k/a Communications Electronics, a/k/a Communications Electronics, Incorporated; BALTIMORE BUSINESS COMMUNICATIONS, INCORPORATED; COMCAST/METROPHONE; RADIOFONE; POWERTEL, INCORPORATED; POWERTEL PCS, INCORPORATED; POWERTEL/ATLANTA, INCORPORATED; MITSUBISHI WIRELESS COMMUNICATIONS, INCORPORATED; MOTOROLA, INCORPORATED, a Delaware corporation; CELLULAR TELECOMMUNICATIONS AND INTERNET ASSOCIATION, a District of

Columbia corporation; CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION; TELECOMMUNICATIONS INDUSTRY ASSOCIATION, a/k/a TIA; NEXTEL PARTNERS OPERATING CORPORATION, Defendants-Appellees, and WESTINGHOUSE COMMUNICATIONS; SOUTHERN TELECOM, INCORPORATED, a/k/a Southern LINC; JOHNDOES 1-100; LGIC CORPORATION; PANASONIC CORPORATION; SAMSUNG SDI COMPANY; SANYO CORPORATION; SONY CORPORATION; PLANET CELLULAR COMMUNICATIONS, INCORPORATED; VISITOR CELLULAR L.L.C.; BELL SOUTH MOBILITY; KYOCERA WIRELESS CORPORATION; MCI WORLDCOM COMMUNICATIONS, INCORPORATED; U.S. WEST WIRELESS, L.L.C., A Colorado corporation; U.S. WEST COMMUNICATIONS, INCORPORATED, a Colorado corporation; GTE MOBIL NET OF SAN DIEGO, INCORPORATED, a Delaware corporation; GTE WIRELESS SAN DIEGO, LLC, a California Limited Liability; CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA, a California corporation; AB CELLULAR HOLDINGS, LLC, d/b/a LA Cellular, d/b/a Los Angeles Cellular Telephone Company, Defendants.

No. 03-1433

402 F.3d 430; 2005 U.S. App. LEXIS 4327

October 1, 2004, Argued
March 16, 2005, Decided

DISPOSITION: Reversed and remanded.

COUNSEL: ARGUED: Michael R. Allweiss, LOWE, STEIN, HOFFMAN, ALLWEISS & HAUVER, L.L.P., New Orleans, Louisiana, for Appellants. Kenneth Winston Starr, KIRKLAND & ELLIS, L.L.P., Washington, D.C., for Appellees.

ON BRIEF: H. Russell Smouse, John C.M. Angelos, Glenn E. Mintzer, LAW OFFICES OF PETER G. ANGELOS, P.C., Baltimore, Maryland; H. Thomas Howell, HOWELL & GATELY, Baltimore, Maryland, for Appellants. Garrett B. Johnson, Terrence J. Dee, Michael B. Slade, KIRKLAND & ELLIS, L.L.P., Chicago, Illinois, for Motorola, Inc. Seamus C. Duffy, Mary Catherine Roper, DRINKER, BIDDLE & REATH, L.L.P., Philadelphia, Pennsylvania, for Cingular Wireless, Inc., SBC Communications, Inc. Mark F. Horning, Thomas M. Barba, STEPTOE & JOHNSON, Washington, D.C., for AT&T Corp., AT&T Wireless PCS, LLC and AT&T Wireless Services, Inc. John H. Beisner, Brian P. Brooks, O'MELVENY & MYERS, LLP, Washington, D.C., for Verizon Wireless, Cellco Partnership. Paul F. Strain, VENABLE, BAETJER AND HOWARD, L.L.P., Baltimore, Maryland; M. King Hill, III, VENABLE, BAETJER AND HOWARD, L.L.P., Towson, Maryland; Jane Fugate Thorpe, Scott A. Elder, ALSTON & BIRD, L.L.P., Atlanta, Georgia, for Cellco Partnership formerly d/b/a Bell Atlantic Mobile and Bell Atlantic Nynex Mobile d/b/a Verizon Wireless, Verizon Maryland, Inc. a/k/a Verizon Wireless, a/k/a Verizon, f/k/a Bell Atlantic-Maryland, Inc., Verizon Communications, Inc., f/k/a Bell Atlantic Corporation, Verizon Wireless, a/k/a Bell Atlantic Nynex, a/k/a Nynex, a/k/a Bell Atlantic Mobile, Inc. f/k/a Bell Atlantic Nynex Mobile, Inc. Thomas Watson, Curtis Renner, WATSON & RENNER, Washington, D.C., for Cingular Wireless, L.L.C. Michael Esher Yaggy, Jeffrey M. Yeatman, PIPER RUDNICK, L.L.P., Baltimore, Maryland, for Motorola, Inc.

for Motorola, Inc. Steven M. Laduzinsky, Scott A. Hanfling, KANE, LADUZINSKY & MENDOZA, LTD., Chicago, Illinois; Robert B. Green, IRWIN, GREEN & DEXTER, L.L.P., Towson, Maryland, for Cellular Telecommunications and Internet Association. Michael H. O'Brien, Jason P. Sultzer, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, White Plains, New York; Laura N. Steel, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, Washington, D.C.; John B. Isbister, Harold M. Walter, TYDINGS & ROSENBERG, L.L.P., Baltimore, Maryland, for Samsung Electronics America, Inc., a/k/a Samsung Electronics. Paul S. Schleifman, SHOOK, HARDY & BACON, L.L.P., Washington, D.C.; J. Stan Sexton, Michael D. Moeller, SHOOK, HARDY & BACON, L.L.P., Kansas City, Missouri, for Sprint PCS Limited Partnership, a/k/a Sprint Spectrum; Sprint Spectrum, L.L.C., d/b/a Sprint PCS. Charles P. Goodell, James A. Frederick, GOODELL, DEVRIES, LEECH & DANN, Baltimore, Maryland, for North America, Inc. a/k/a Sanyo North America Group, Sanyo Corporation, Sanyo Business Systems Corporation. Steven M. Zager, Lance Lackey, Robert Pemberton, AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P., Houston, Texas; Paul F. Walter, TYDINGS AND ROSENBERG, L.L.P., Baltimore, Maryland, for Nokia, Inc., a/k/a Nokia Mobile Phones, Inc., and Nokia Corporation. Ray M. Aragon, Raymond B. Biagini, MCKENNA, LONG & ALDRIDGE, L.L.P., Washington, D.C., for Electronics North America Corporation. Eugene A. Schoon, Tamar B. Kelber, SIDLEY, AUSTIN, BROWN & WOOD, L.L.P., Chicago, Illinois, for Voicestream Wireless Corporation a/k/a Voicestream Wireless, Powertel, Inc., Powertel PCS, Inc., Powertel/Atlanta, Inc. Patrick R. Buckler, Walter T. Dudley, MCGUIREWOODS, L.L.P., Baltimore, Maryland; Edward M. Crane, David L. Hanselman, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Chicago, Illinois, for Nextel Communications of the Mid-Atlantic, Inc., Nextel of New

York, Inc., and Nextel South Corp. James P. Ulwick, KRAMON & GRAHAM, P.A., Baltimore, Maryland, for NEC America, Inc. Francis A. Citera, GREENBERG & TRAURIG, P.C., Chicago, Illinois, for Electronics Inc., Qualcomm Incorporated. Russell J. Rogers, Lawrence A. Slovensky, MCKENNA, LONG & ALDRIDGE, L.L.P., Atlanta, Georgia, for Partners Operating Corp. and Nextel Partners, Inc. Paul D. Krause, Laura N. Steel, WILSON, ELSER, MOSKOWITZ, EDLEMAN & DICKER, L.L.P., Washington, D.C., for Matsushita Corporation of America, a/k/a Panasonic Corporation, and Sanyo North America, Inc. a/k/a Sanyo North America Group; Sanyo Corporation; Sanyo Business Systems, Corporation. Paul Vishny, Paul Freehling, D'ANCONA & PFLAUM, L.L.C., Chicago, Illinois, for Telecommunications Industry Association. Mark H. Kolman, Leslie R. Cohen, DICKSTEIN, SHAPIRO, MORIN & OSHINSKY, L.L.P., Washington, D.C., for Audiovox Communications Corp. Charles L. Perry, ANDREWS & KURTH, L.L.P., Dallas, Texas, for Cellular One Group. Matthew T. Covell, Kevin B. Getzendanner, ARNALL, GOLDEN & GREGORY, L.L.P., Atlanta, Georgia, for Mitsubishi Wireless Communications, Inc. Daniel S. Reinhardt, Steven J. Hewitson, TROUTMAN SANDERS, L.L.P., Atlanta, Georgia, for Southern Telecom, Inc. Gregg L. Bernstein, Denis J. Charlesworth, MARTIN, SNYDER & BERNSTEIN, P.A., Baltimore, Maryland; Charles L. Babcock, David T. Moran, James M. McCown, Ryan C. Wirtz, JACKSON WALKER, L.L.P., Dallas, Texas, for Ericsson Inc. Maureen Ellen Murphy, MURPHY & MURPHY, L.L.C., Catonsville, Maryland, for Baltimore Business Communications, Inc. John A. Stewart, Jr., HULSE & WANEK, New Orleans, Louisiana; Mark J. Jeansonne, MILLING, BENSON, WOODWARD, New Orleans, Louisiana, for Radiofone, Inc.

JUDGES: Before LUTTIG and MICHAEL, Circuit Judges, and Jackson L. KISER, Senior United States District Judge for the Western District of Virginia, sitting by designation. Judge Michael wrote the opinion, in which Judge Luttig joined. Senior Judge Kiser wrote a dissenting opinion.

OPINION BY: MICHAEL

OPINION: MICHAEL, Circuit Judge:

This multidistrict litigation includes five class actions brought initially in the state courts of Georgia, Louisiana, Maryland, New York, and Pennsylvania. The plaintiffs sue Nokia Inc. and other entities (collectively, "Nokia") involved in the manufacture and sale of wireless telephones. The plaintiffs claim that wireless telephones emit an unsafe level of radio frequency radiation and that Nokia has hidden this fact from consumers. Nokia removed the five cases to various federal courts, and the Judicial Panel on Multidistrict Litigation (JPML) transferred the cases to the United States District Court for the District of Maryland (the district court) for consolidated pretrial proceedings. The district court denied the plaintiffs' motion to remand four of the cases to state court and then dismissed all five cases on the ground that the plaintiffs' state law claims are preempted by the Federal Communications Act of 1934 (FCA), *47 U.S.C. § 151 et seq.* The plaintiffs appeal both rulings. Because federal subject matter jurisdiction is lacking in four of the cases, we reverse the district court's order denying the motion to remand those cases. There is diversity jurisdiction over the fifth case, and because the state law claims are not preempted, we reverse the order dismissing that case.

I.

A wireless telephone (commonly called a cell phone) is actually a radio containing a low power transmitter. When a wireless telephone is turned on, it searches for a base station

(usually a tower) within range. A base station is a fixed transmitter containing antennae and electronic equipment that communicates with the transmitter in a wireless telephone. If a wireless telephone finds a base station within range, the telephone identifies itself by transmitting its Mobile Identification Number (MIN), its System Identification Code (SID), and its Electronic Serial Number (ESN). The ESN is a number permanently programmed into the telephone when it is manufactured. The SID and the MIN are programmed into the wireless telephone when a customer purchases a service plan and the telephone is activated. The base station relays the identifying information (MIN, SID, and ESN) to the local mobile telephone switching office (MTSO), which confirms that the telephone is assigned to a valid customer. An MTSO is a sophisticated computer that controls all of the base stations in a particular area for the purpose of coordinating radio transmissions to and from wireless telephones. Once an MTSO confirms that a wireless telephone is assigned to a valid customer, the MTSO assigns a frequency on which the user may communicate.

Base stations receiving and routing transmissions from wireless telephones have a relatively small transmission range because they have low power transmitters. Accordingly, to provide continuous wireless telephone service coverage over an extended area, numerous base stations must be built. Cities and regions are divided into cells, typically ten square miles, each containing a base station. As a user moves out of one cell (and thus out of range of the base station in that cell) and into an adjoining cell, the MTSO hands the signal off to the base station in the adjoining cell. Marshall Brain & Jeff Tyson, *How Cell Phones Work, at* http://www.howstuffworks.com/cell-phone.htm/printable (last visited January 24, 2005).

Wireless telephones emit a low level of radio frequency (RF) radiation, a form of electromagnetic energy, from their

antennae when they communicate with base stations. *See Cell Phone Facts: Consumer Information on Wireless Phones, at* http://www.fda.gov/cellphones/qa.html (last updated July 29, 2003). While it is well established that exposure to high levels of RF radiation can cause adverse health effects, there is no scientific consensus on the effects of low level exposure. The Federal Communications Commission (FCC) requires all transmitters that emit RF radiation to be authorized by the agency before they are marketed or sold. *See 47 C.F.R. § § 2.801, 2.803 (2004).* Pursuant to the National Environmental Policy Act of 1969, *42 U.S.C. § 4321 et seq.*, which requires agencies to consider the impact of their actions on the quality of the human environment, the FCC has promulgated rules that limit the amount of RF radiation that FCC-regulated transmitters (including wireless telephones) may emit. *In re Guidelines for Evaluating the Envtl. Effects of Radio frequency Radiation, 11 FCC Rcd. 15123, 15125 (1996) (In re Guidelines); see 47 C.F.R. § § 1.1307, 1.1310, 2.1091, 2.1093.*

The plaintiffs brought five class actions in state courts against Nokia, claiming, among other things, that (1) wireless telephones emit an unsafe level of RF radiation and (2) Nokia, in knowing this, negligently and fraudulently endangered the consuming public by marketing wireless telephones without headsets. According to the plaintiffs, they were exposed to the risk of adverse biological effects from the RF radiation emitted by their wireless telephones when they used the telephones without headsets. The plaintiffs purport to represent wireless telephone users who have not been diagnosed with brain- or eye-related diseases and who were not provided headsets when they leased or bought their wireless telephones. Compensatory damages are sought in an amount sufficient to buy a headset for each class member who lacks one and to reimburse each class member who has already bought one. For class members with wireless

telephones that are not headset-compatible, an injunction is sought to require Nokia to provide them with telephones that can be used with a headset. The plaintiffs also seek punitive damages, costs, and attorneys' fees.

After these cases were filed in the five state courts, Nokia removed them, pursuant to *28 U.S.C. § 1447*, to the five appropriate federal district courts. On October 31, 2001, the JPML transferred the five cases to the District of Maryland for consolidated or coordinated pretrial proceedings. On January 7, 2002, the plaintiffs in four of the cases -- those with lead plaintiffs named Pinney, Farina, Gilliam, and Gimpelson (collectively, the "Pinney plaintiffs") -- filed a consolidated motion to remand their cases to the state courts in which they originated. The plaintiffs in the fifth case (the "Naquin plaintiffs") did not join this motion because there was federal subject matter jurisdiction over their case based on diversity of citizenship. On June 21, 2002, the district court denied the Pinney plaintiffs' motion to remand on the ground that their claims necessarily depend on the resolution of a substantial federal question. According to the district court, the claims are a disguised attack on the FCC's RF radiation standards, and resolution of the claims would require the court to rule on the validity of those standards.

After remand was denied, Nokia filed a consolidated motion to dismiss for failure to state a claim, *see Fed. R. Civ. P. 12(b)(6)*, on the ground of federal preemption. On March 5, 2003, the district court granted Nokia's motion on the basis that the plaintiffs' claims are preempted by the FCA. More specifically, the district court concluded that the relief sought by the plaintiffs in all five cases conflicts with Congress's goal of achieving national uniformity in RF radiation emission levels for all wireless telecommunications equipment. The plaintiffs appeal the district court's orders.

II.

We turn first to the district court's order denying the Pinney plaintiffs' consolidated motion to remand their four cases to state court. Federal removal jurisdiction may be exercised over state court actions "of which the district courts of the United States have original jurisdiction." *28 U.S.C. § 1441(a).* The original jurisdiction of the district courts includes jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." *28 U.S.C. § 1331.* The propriety of Nokia's removal of the Pinney plaintiffs' state court cases depends on whether the claims "arise under" federal law. *See Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994).* We must strictly construe our removal jurisdiction because removal "raises significant federalism concerns." *Id.* "If it appears before final judgment that a case was not properly removed, because it was not within the original jurisdiction of the United States district courts, the district court must remand it to the state court from which it was removed." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)* (citing *28 U.S.C. § 1447(c)*).

We begin with the issue of whether the Pinney plaintiffs' claims arise under federal law pursuant to the substantial federal question doctrine. We then address whether their claims arise under federal law pursuant to the doctrine of complete preemption. We ultimately conclude that the claims of the Pinney plaintiffs do not arise under federal law by reason of either doctrine. Accordingly, the district court lacked jurisdiction over these claims, and the court erred in denying the Pinney plaintiffs' consolidated motion to remand their cases to state court.

A.

In determining whether a plaintiff's claim arises under federal law, we apply the well-pleaded complaint rule, which

holds that courts "ordinarily . . . look no further than the plaintiff's [properly pleaded] complaint in determining whether a lawsuit raises issues of federal law capable of creating federal-question jurisdiction under *28 U.S.C. § 1331*." *Custer v. Sweeney, 89 F.3d 1156, 1165 (4th Cir. 1996)*. Thus, in examining the complaint, our first step is to "discern whether federal or state law creates the cause of action." *Mulcahey, 29 F.3d at 151*; *see also Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 816 (4th Cir. 2004)* ("The vast majority of lawsuits 'arise under the law that creates the cause of action.'") (quoting *Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260, 60 L. Ed. 987, 36 S. Ct. 585 (1916)*). If federal law creates a plaintiff's claim, then removal is proper. *Mulcahey, 29 F.3d at 151*. The general rule, of course, is that a plaintiff is the "master of the claim," and he may "avoid federal jurisdiction by exclusive reliance on state law" in drafting his complaint. *Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987)*. Here, it is undisputed that state law creates the claims asserted by the Pinney plaintiffs, but this does not end our inquiry. We must also determine whether these cases fall within the small class of "cases in which a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded . . . claims." *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988)* (quoting *Franchise Tax Bd., 463 U.S. at 13, 27-28)* (internal quotation marks and citations omitted). Under the substantial federal question doctrine, "a defendant seeking to remove a case in which state law creates the plaintiff's cause of action must establish two elements: (1) that the plaintiff's right to relief necessarily depends on a question of federal law, and (2) that the question of federal law is substantial." *Dixon, 369 F.3d at 816*. If the defendant fails to establish either of these elements, the claim does not

arise under federal law pursuant to the substantial federal question doctrine, and removal cannot be justified under this doctrine. *Id.*

A plaintiff's right to relief necessarily depends on a question of federal law when "it appears that some . . . disputed question of federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd., 463 U.S. at 13.* If a plaintiff can establish, without the resolution of an issue of federal law, all of the essential elements of his state law claim, then the claim does not necessarily depend on a question of federal law. *See id. at 13-14*; *see also Dixon, 369 F.3d at 817* ("If the plaintiff can support his claim with even one theory that does not call for an interpretation of federal law, his claim does not 'arise under' federal law for purposes of *§ 1331.*"). This principle is illustrated in *Franchise Tax Board.* There, the Supreme Court found no substantial federal question when a California tax agency attempted to enforce a levy on funds held in trust for several taxpayers under an ERISA-covered benefit plan. *463 U.S. at 13-14.* The claim did not necessarily depend on a resolution of federal law because "California law established a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law became relevant only by way of a defense to an obligation created entirely by state law, and then only if [the state agency] had made out a valid claim for relief under state law." *Id. at 13.* "It has been well-settled law," the Court noted, "that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Id. at 14.*

We now examine the claims in the complaints filed by the Pinney plaintiffs. We note parenthetically that the district

court allowed these plaintiffs to amend their complaints after it denied their motion to remand. Because amendment occurred after removal, we look at the original complaints rather than the amended complaints in determining whether removal was proper. *See Pullman Co. v. Jenkins, 305 U.S. 534, 537, 83 L. Ed. 334, 59 S. Ct. 347 (1939).* The Pinney plaintiffs assert seven claims in their original complaints. They first allege that Nokia is strictly liable for placing a defectively designed product into the stream of commerce. These claims are brought under the laws of Georgia, Maryland, New York, and Pennsylvania. Under the laws of all four states, a manufacturer (and sometimes a seller) is strictly liable for selling a defectively designed product that causes personal injury. Georgia, Maryland, and New York assess whether a product suffers from a design defect by using the risk-utility balancing test. Under this test a fact-finder must determine whether the manufacturer acted reasonably in choosing a particular product design, given the probability and magnitude of the risk, the usefulness of the product in its particular condition, and the burden on the manufacturer to eliminate the risk. *See Banks v. ICI Ams., Inc., 264 Ga. 732, 450 S.E. 2d 671, 673-74 (Ga. 1994); Nissan Motor Co. v. Nave, 129 Md. App. 90, 740 A.2d 102, 118 (Md. Ct. Spec. App. 1999); Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 450 N.E.2d 204, 208-09, 463 N.Y.S.2d 398 (N.Y. 1983).* Under Pennsylvania law a product suffers from a design defect if it lacks a component necessary to make it safe for its intended use. *See Harsh v. Petroll, 840 A.2d 404, 416-17 (Pa. 2003).*

Second, the Pinney plaintiffs allege that Nokia is strictly liable for its failure to warn about the adverse health risks associated with wireless telephones. These claims are brought under the laws of Georgia, Maryland, New York, and Pennsylvania. According to these laws, when a manufacturer or a seller knows or should have known of the latent danger of a product and fails to warn the consuming

public, the manufacturer or seller is strictly liable for injuries caused by the danger while the product is used in a foreseeable manner. *See Hunt v. Harley-Davidson Motor Co., 147 Ga. App. 44, 248 S.E. 2d 15, 16 (Ga. Ct. App. 1978)*; *Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633, 639 (Md. 1992)*; *Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 591 N.E.2d 222, 225, 582 N.Y.S.2d 373 (N.Y. 1992)*; *Davis v. Berwind Corp., 547 Pa. 260, 690 A.2d 186, 190 (Pa. 1997)*.

Third, the Pinney plaintiffs allege that Nokia is liable for violating various state consumer protection statutes. These claims are brought under the laws of Maryland, New York, and Pennsylvania, where the relevant statutes allow a plaintiff to recover for losses or injuries sustained when a merchant engages in deceptive trade practices. *See Md. Code Ann., Com. Law II, § 13-408*; *N.Y. Gen. Bus. Law § 349(h)* (McKinney); *73 Pa. Cons. Stat. § 201-9.2*. These statutes generally require a plaintiff to prove either (1) that the defendant made materially false or misleading statements about its product that deceived, or had the tendency to deceive, consumers, or (2) that the defendant failed to state a material fact with respect to its product, and this failure deceived, or had the tendency to deceive, consumers. *See Md. Code Ann., Com. Law II, § 13-301(1), (2)(i), (3), (9)(i)*; *N.Y. Gen. Bus. Law § 350-a(1)*; *73 Pa. Cons. Stat. § 201-2(4)(v), (vii), (ix), (xxi)*.

Fourth, the Pinney plaintiffs allege that Nokia breached an implied warranty of merchantability by selling and distributing unreasonably dangerous wireless telephones. These claims are brought under the laws of Georgia, Maryland, New York, and Pennsylvania. To make out a claim for breach of this implied warranty, a plaintiff must establish that a product is not of merchantable quality and that he suffered an injury as a result. A product is not of merchantable quality when it is not fit for the ordinary

purposes for which it is used. *See Wilson v. J & L Melton, Inc., 270 Ga. App. 1, 606 S.E. 2d 47, 49 n. 1 (Ga. Ct. App. 2004)*; *Ford Motor Co. v. Gen. Acc. Ins. Co., 365 Md. 321, 779 A.2d 362, 370 n. 13 (Md. 2001)*; *Denny v. Ford Motor Co., 87 N.Y.2d 248, 662 N.E.2d 730, 736, 639 N.Y.S.2d 250 (N.Y. 1995)*; *Phillips v. Cricket Lighters, 2004 PA Super 217, 852 A.2d 365, 370-71 (Pa. Super. Ct. 2004)*. In determining whether a product is of merchantable quality, the fact-finder focuses on the "expectations for the performance of the product when used in the customary, usual, and reasonably foreseeable manners." *Denny, 662 N.E.2d at 736.*

Fifth, the Pinney plaintiffs allege that Nokia was negligent (1) in failing to conduct adequate and appropriate scientific research on the adverse health effects of exposure to RF radiation from wireless telephones, (2) in misrepresenting to the public that wireless telephones are safe, (3) in suppressing any scientific evidence suggesting that wireless telephones are not safe, (4) in failing to provide warnings about the potential health risks from failing to use a headset, and (5) in failing to provide headsets and instructions encouraging their use. These claims are brought under the laws of Georgia and Maryland. To make out a claim for negligence, a plaintiff must establish the following elements: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the plaintiff suffered an injury, and (4) there was a causal connection between the breach and the injury. *See Johnson v. Am. Nat'l Red Cross, 276 Ga. 270, 578 S.E. 2d 106, 108 (Ga. 2003)*; *Hemmings v. Pelham Wood LLP, 375 Md. 522, 826 A.2d 443, 451 (Md. 2003)*. A manufacturer generally has a duty to exercise reasonable care in manufacturing, designing, and selling its products "so as to make the products reasonably safe for intended or foreseeable uses." *Chrysler Corp v. Batten, 264 Ga. 723, 450 S.E. 2d 208, 211 (Ga. 1994)* (citation omitted); *see also Eagle Pitcher Indus., Inc. v. Balbos, 326 Md. 179, 604 A.2d 445, 454 n. 9 (Md. 1992).*

Sixth, the Pinney plaintiffs allege that Nokia engaged in fraud by misinforming and misleading the public as to the safety of wireless telephones. These claims are brought under the laws of Georgia, Maryland, New York, and Pennsylvania. To make out a claim for fraud, a plaintiff must establish the following elements: (1) the defendant made a false representation, (2) the defendant knew the representation was false or was recklessly indifferent to its truth or falsity, (3) the defendant made the representation with the intent to defraud the plaintiff, (4) the plaintiff justifiably relied on the false representation, and (5) the plaintiff suffered damages as a result. *See Rhone v. Bolden, 270 Ga. App. 712, 608 S.E.2d 22, 2004 WL 2567343 (Ga. Ct. App. 2004)*; *Martens Chevrolet, Inc. v. Seney, 292 Md. 328, 439 A.2d 534, 537 (Md. 1982)*; *P. Chimento Co. v. Banco Popular de Puerto Rico, 208 A.D.2d 385, 617 N.Y.S. 2d 157, 158 (N.Y. App. Div. 1994)*; *Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882, 889 (Pa. 1994)*. Concealment of a material fact, with intent to deceive, satisfies the false representation element of fraud. *See Paul v. Destito, 250 Ga. App. 631, 550 S.E. 2d 739, 744 (Ga. Ct. App. 2001)*; *Hoffman v. Stamper, 155 Md. App. 247, 843 A.2d 153, 186 (Md. Ct. Spec. App. 2004)*; *Nasaba Corp. v. Harfred Realty Corp., 287 N.Y. 290, 39 N.E.2d 243, 245 (N.Y. 1942)*; *De Joseph v. Zambelli, 392 Pa. 24, 139 A.2d 644, 647 (Pa. 1958)*.

Seventh, the Pinney plaintiffs allege that Nokia engaged in a civil conspiracy to market unsafe wireless telephones by improper and wrongful means, and, in doing so, both defrauded the plaintiffs and failed to warn them of the health risks of using wireless telephones. These claims are brought under the laws of Georgia and Maryland. In a claim for civil conspiracy a plaintiff must establish that two or more defendants, acting in concert, engaged in conduct constituting a tort. Damages are assessed on the basis of the defendants' tortious conduct, not on the basis of their agreement to engage in such conduct. *See Miller v. Lomax,*

266 Ga. App. 93, 596 S.E. 2d 232, 242 (Ga. Ct. App. 2004); Alleco, Inc. v. Harry & Jeanette Weinberg Found., Inc., 99 Md. App. 696, 639 A.2d 173, 176-77 (Md. Ct. Spec. App. 1994).

We have thoroughly examined the claims asserted by the Pinney plaintiffs in their complaints, and one thing is clear: the elements of each of the claims depend only on the resolution of questions of state law. There is no "substantial, disputed question of federal law [that] is a necessary element of [any] of the well-pleaded state claims." *Franchise Tax Bd., 463 U.S. at 13.* The district court, however, determined that these cases depend on the resolution of a substantial federal question because the claims "put . . . directly into dispute" the validity and sufficiency of the federal RF radiation standards for wireless telephones. *See In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig., 216 F. Supp. 2d 474, 488 (D. Md. 2002)* (*In re Wireless I*). The ultimate objective of these complaints, according to the district court, "is to attack the lack of a headset requirement under the federal RF safety rules." *Id.* Although the court acknowledged that the complaints contain no allegations attacking the federal RF radiation standards, it believed that it could ultimately resolve the case only by passing judgment on the validity of the federal standards. The court therefore determined that removal was justified under the substantial federal question doctrine. *Id. at 488, 491-92.*[1]

The district court erred by not recognizing that its inquiry was limited by the well-pleaded complaint rule. It should

---

[1] The dissent makes the same argument as the district court -- that a substantial federal question exists because "the effect of [the Pinney plaintiffs'] allegations" is to "challenge the sufficiency of the FCC standard." *Post* at 37. As we explain in the text that follows, this argument cannot be sustained.

have considered only whether a disputed question of federal law is an essential element of one of the well-pleaded state claims. *See Franchise Tax Bd., 463 U.S. at 13.* The district court went beyond this restricted inquiry and in effect anticipated (1) that Nokia would raise the affirmative defense that the state law claims are preempted by the FCA and federal RF radiation standards and (2) that the Pinney plaintiffs would be called upon to rebut that defense. The cases could be decided, the court concluded, only by resolving whether the claims are preempted by the FCA and the federal RF radiation standards. Even if that is so, a preemption defense "that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 808, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986).* Again, "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption," even if the complaint begs the assertion of the defense, and even if "the defense is the only question truly at issue in the case." *Franchise Tax Bd., 463 U.S. at 14.*

The thrust of the claims is that Nokia violated state law by manufacturing and selling a product that it knew, or should have known, was dangerous and by not adequately warning of the dangers. As was the case in *Franchise Tax Board*, state law establishes a set of elements, without reference to federal law, that the plaintiffs must establish in order to a make out "valid claims for relief." *463 U.S. at 13.* Federal law becomes relevant only as a defense, and only after the Pinney plaintiffs have made out the elements of their state law claims. In this situation, as the Supreme Court has observed, "the most one can say is that a question of federal law is lurking in the background." *Gully v. First Nat'l Bank, 299 U.S. 109, 117, 81 L. Ed. 70, 57 S. Ct. 96 (1936).* The lurking question of federal law is, of course, the affirmative defense of preemption, but that does not make the claims into ones arising under federal law.

B.

It becomes even clearer that the Pinney plaintiffs' claims do not contain a disputed question of federal law when we consider Nokia's arguments. Nokia argues that an issue of federal law must be resolved for the Pinney plaintiffs to establish the necessary elements for two of their claims. Nokia first points to the claim of strict liability due to a design defect. As discussed above, *see supra* at 12-13, one element a plaintiff must establish is that the product suffered from a design defect. A design defect is established by proving that the product is unreasonably dangerous, as determined by the risk-utility standard. Nokia argues that the FCC's RF radiation standards establish the relevant "duty" with regard to RF radiation emissions from wireless telephones, and therefore the unreasonably dangerous inquiry depends on the resolution of a federal question. Br. for Appellees at 26. Nokia's use of the term "duty" is misplaced because the term is more commonly employed in a negligence context, not a strict liability context. In any event, the nub of Nokia's argument is that a wireless telephone's compliance (or noncompliance) with the federal RF radiation standards determines whether the telephone is unreasonably dangerous. Nokia is wrong. Under the laws of Georgia, Maryland, and New York, compliance with the federal RF radiation standards is only one factor in assessing whether a wireless telephone is unreasonably dangerous under the risk-utility standard. *See Doyle v. Volkswagenwerk Aktiengesellschaft, 267 Ga. 574, 481 S.E. 2d 518, 521 (Ga. 1997)*; *Beatty v. Trailmaster Prods., 330 Md. 726, 625 A.2d 1005, 1014 (Md. 1993)*; *Denny, 662 N.E.2d at 735-36*; *Sherman v. M. Lowenstein & Sons, Inc., 28 A.D.2d 922, 282 N.Y.S. 2d 142, 143-44 (N.Y. App. Div. 1967)*. And because Pennsylvania law rejects the importation of negligence concepts into its strict liability doctrine, compliance with the federal RF radiation standards is not relevant in determining whether Nokia is strictly liable under Pennsylvania law for

selling a product that suffers from a design defect. *See Lewis v. Coffing Hoist Div., Duff-Norton Co., 515 Pa. 334, 528 A.2d 590, 593-94 (Pa. 1987)* (holding that product compliance with industry standards is irrelevant in strict liability case based on defective design). Thus, even if Nokia's wireless telephones comply with the federal RF radiation standards, the Pinney plaintiffs could still establish the defective design element of the their strict liability claim. Conversely, if Nokia's wireless telephones do not comply with the federal RF radiation standards, the Pinney plaintiffs would not automatically establish the defective design element.

Nokia also argues that the Pinney plaintiffs "need to establish disputed federal-law propositions" to make out their fraud claims. Br. for Appellees at 27. To make out a claim of fraud, a plaintiff must establish, among other elements, that the defendants made a false statement. Nokia asserts that the Pinney plaintiffs, in order to prove that statements made by Nokia were false, must demonstrate that the "substantive content of federal wireless emissions regulations is inconsistent with [Nokia's] alleged characterizations of those regulations." *Id.* This is a mischaracterization of the fraud claims. The Pinney plaintiffs do not allege that Nokia fraudulently misrepresented the RF radiation standards. Rather, they allege that Nokia made false statements by misrepresenting the general safety of wireless telephones and by misrepresenting or failing to disclose the biological risks posed by wireless telephones. To prove the falsity of these statements, the Pinney plaintiffs must establish that the RF radiation emissions from wireless telephones create a health risk. This has nothing to do with the substantive content of the federal regulations. In sum, there is no substantial question of federal law that is a necessary element of the

Pinney plaintiffs' strict liability (design defect) or fraud claims.[2]

To get around this problem, Nokia advances a new theory -- the "sufficient connection" to a federal regulatory scheme theory -- for why the Pinney plaintiffs' claims are removable pursuant to the substantial federal question doctrine. Nokia relies on our decision in *Ormet Corp. v. Ohio Power Co., 98 F.3d 799 (4th Cir. 1996)*, to argue that

---

[2] In arguing for removal jurisdiction, the dissent points to one of the many factual allegations made by the Pinney plaintiffs in support of their fraud claims. The Pinney plaintiffs allege that Nokia engaged in fraud on an occasion when it claimed that wireless telephones are safe and "fall within [FCC] safety standards," but "deceitfully omitted the fact that the FCC had declared that it does *not* consider itself the 'expert agency' for evaluating health effects." J.A. 142 (emphasis in original). According to the dissent, this allegation "calls into question the expertise of the FCC." *Post* at 37. That is not the case. To establish that the safety statement made by Nokia was false, a necessary element for fraud, the Pinney plaintiffs need only prove that the failure to disclose the FCC's statement was the concealment of a material fact or that Nokia's safety statement was false in light of the FCC's statement. The plaintiffs will not have to prove any lack of FCC expertise in the RF radiation area in order to establish that Nokia made false statements about the safety of wireless telephones. A "substantial, disputed question of federal law" is simply not a necessary element of the fraud claims. *Franchise Tax Bd., 463 U.S. at 13.*

The dissent also relies on a general allegation in the Pinney plaintiffs' complaint to support its argument that removal jurisdiction exists. This allegation is that Nokia "obtained and exercised control over the American National Standards Institute (' ANSI') Committee responsible for developing safety standards for RFR emitting devices." J.A. 140. ANSI's proposals regarding RF radiation standards were generally adopted in FCC rulemaking. *See In re Guidelines, 11 FCC Rcd. at 15123-25.* According to the dissent, the allegation about Nokia's influence over ANSI means that the plaintiffs "are . . . attacking the rule-making process that the FCC used in developing [its RF radiation] standards." *Post* at 38. The dissent, however, does not explain how the allegation about ANSI raises a substantial question of federal law that is a necessary element of any one of the plaintiffs' state law claims.

"where a plaintiff's state law complaint is sufficiently connected to a federal regulatory regime as to which Congress has expressed a need for uniform implementation and interpretation, that connection can provide a basis for federal question jurisdiction even if no explicitly federal claim is pled." Br. for Appellees at 25. Nokia does not suggest a standard for determining when a connection is sufficient to render removal proper under its theory, but it nonetheless asserts that a sufficient connection exists in the present cases. According to Nokia, there is a comprehensive federal scheme to regulate wireless telecommunications, and Congress has delegated to federal regulators the exclusive authority over all technical aspects of wireless telecommunications. A sufficient connection exists between the telecommunications regulatory regime and the Pinney plaintiffs' claims, Nokia says, because the claims are premised on the amount of RF radiation that emits from wireless telephones, a technical aspect of wireless telephones that is regulated by the FCC. To begin with, Nokia's sufficient connection theory, as applied to these claims, is similar to, if not indistinguishable from, the argument that the Pinney plaintiffs' claims are removable under the substantial federal question doctrine because they are preempted by the FCA and the federal RF radiation standards. Nokia, of course, avoids couching its argument in preemption terms because it knows that the affirmative defense of preemption cannot serve as a basis for removal under the substantial federal question doctrine. Regardless of whether Nokia's sufficient connection theory is at bottom a preemption argument, we reject it because it is not supported by our *Ormet* decision, and it is inconsistent with Supreme Court precedent.

Ormet does not establish, or even support, Nokia's sufficient connection theory. In *Ormet* one of the elements of the plaintiff's state commercial law claim contained a disputed question of federal law: for the plaintiff to establish

the element, it had to show that it was an owner (as defined by the federal *Clean Air Act*) of tradeable emission allowance permits. *98 F.3d at 807.* Nokia relies on our statement, "where the resolution of a federal issue in a state-law cause of action could, because of different approaches and inconsistency, undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest, justifying the exercise of jurisdiction by federal courts." *Id. at 807* (citation omitted). Nokia claims this language stands for the proposition that a nexus (or, in Nokia's words, a "sufficient connection") between a plaintiff's claim for relief and a federal regulatory scheme is sufficient to establish removal jurisdiction. Nokia's reliance on the quoted statement from *Ormet* is completely off the mark because the statement specifically addresses the issue of whether a federal question is substantial enough to justify removal jurisdiction, not the threshold issue of whether a federal question must be resolved in order for the plaintiff to establish a necessary element of his claim. Nowhere in *Ormet* did we ever suggest that some "sufficient connection" between a federal regulatory regime and a state claim is enough to establish removal jurisdiction. In short, *Ormet* did not slacken in any way the principle that the substantial federal question doctrine applies only when a disputed issue of federal law is an essential element of at least one of the plaintiffs' state claims.

Ormet aside, Nokia's sufficient connection theory is inconsistent with Supreme Court precedent. By Nokia's reasoning, even if the Pinney plaintiffs can establish the necessary elements of their claims without resolving a question of federal law, the cases are still removable under the substantial federal question doctrine because of a connection between the federal scheme regulating wireless telecommunications and the Pinney plaintiffs' state claims. That is not enough. The Supreme Court has been quite clear that for removal to be proper under the substantial federal

question doctrine, a plaintiff's ability to establish the necessary elements of his state law claims must rise or fall on the resolution of a question of federal law. *See Merrell Dow, 478 U.S. at 813* ("The mere presence of a federal issue in a state cause of action does not confer federal question jurisdiction."). In sum, removal of these cases cannot be sustained on the basis of the substantial federal question doctrine.

C.

Having determined that these cases do not arise under federal law pursuant to the substantial federal question doctrine, we consider whether they arise under federal law through the doctrine of complete preemption. Under complete preemption a state claim arises under federal law when Congress "so completely pre-empts a particular area that any civil complaint raising the select group of claims is necessarily federal in character." *Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987)*. There is, of course, a difference between the doctrine of complete preemption and the affirmative defense of federal preemption. "As a defense, [federal preemption] does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Id. at 63* (citation omitted). In contrast, the doctrine of complete preemption "converts an ordinary state common law complaint into one stating a federal claim," *id. at 65*, and the federal claim is deemed to appear on the face of the complaint. *Darcangelo v. Verizon Communications, Inc., 292 F.3d 181, 187 (4th Cir. 2002)*. To remove an action on the basis of complete preemption, a defendant must establish that the plaintiff has a "discernible federal [claim]" and that "Congress intended [the federal claim] to be the exclusive remedy for the alleged wrong." *King v. Marriott Int'l, Inc., 337 F.3d 421, 425 (4th Cir. 2003)*.

In assessing the removal of these cases on the basis of complete preemption, our basic inquiry is whether the FCA establishes the exclusive claim for consumers alleging injury by wireless telephones. Nokia argues that *§ § 201* and *207* of the FCA provide the exclusive claim for the Pinney plaintiffs. *Section 207* allows private parties to sue common carriers and recover damages resulting from a common carrier's breach of its obligations under the FCA. *47 U.S.C. § 207*. Nokia argues that the Pinney plaintiffs' exclusive claim is to allege that Nokia violated *§ 201(b)*, which imposes on common carriers the obligation that "all charges, practices, classifications, and regulations for and in connection with [wire or radio] communication service, shall be just and reasonable." *47 U.S.C. § 201(b)*. Specifically, Nokia argues that the sale of dangerous wireless telephones constitutes a "practice in connection with" wireless service. Nokia is wrong in saying that the FCA provides the exclusive claim.

First off, *§ 207* does not provide any claim against a number of the defendants in these cases. *Sections 201* and *207* allow recovery only against common carriers. Under the FCA "'common carriers' are entities that must provide [transmission] services to the public without discrimination and are heavily regulated by the FCC." *In re Application of the United States for an Order Authorizing the Roving Interceptions of Oral Communications, 349 F.3d 1132, 1137 n. 9 (9th Cir. 2003)* (citations omitted); *see also 47 U.S.C. § 153(10)*. In the wireless telecommunications arena, "[a] person engaged in the provision of" wireless service is treated as a common carrier. *See 47 U.S.C. § 332(c)(1)(A)*. In their complaints the Pinney plaintiffs name two groups of defendants: providers of wireless service (that also market and distribute wireless telephones) and manufacturers of wireless telephones. As to the second group, the plaintiffs allege that these defendants "engaged in the design, manufacture, marketing, and sale of" wireless telephones. *See, e.g.*, J.A. 122-127. There are no allegations that these

manufacturer-defendants are engaged in providing any wireless service, and we therefore conclude that these defendants cannot be treated as common carriers. As a result, they cannot be sued under *§ § 201* and *207*.

As to the first group of defendants (certain wireless service providers), Nokia does not cite to any authority that supports the proposition that *§ § 201* and *207* provide wireless telephone users with a claim against wireless service providers for their role in marketing and distributing wireless telephones. An interpretation of *§ 201* that would construe the selling of dangerous wireless telephones as a "practice in connection with" wireless service would be dubious at best. A "practice in connection with" wireless service does not even include tortious conduct such as deceptive advertising and billing by wireless service providers in the provision of wireless telephone service. *See Marcus v. AT & T Corp., 138 F.3d 46, 54 (2d Cir. 1998)*. Further, even if we were to broadly construe *§ 201* as Nokia urges, there is simply no evidence that Congress intended *§ § 201* and *207* to be the exclusive claim for plaintiffs alleging injury from wireless telephones. Nokia fails to identify any evidence in the statute or legislative history that Congress intended *§ § 201* and *207* to preempt completely state law claims that are based on a wireless service provider's sale and promotion of wireless telephones. The single authority to which Nokia cites is an FCC statement claiming that individual states should not be permitted to add additional requirements to the standards the FCC imposes for cellular systems. *See* Br. for Appellees at 36 (citing *In re An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Sys.; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communication Sys., 89 F.C.C. 2d 58 (1982)*). This statement is not evidence of congressional intent, and we accord it no weight. The FCA also contains a savings clause: "Nothing contained in this chapter shall in any way abridge

or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." *47 U.S.C. § 414*. The presence of a savings clause counsels against a finding that Congress intended to sweep aside all state claims in a particular area. Indeed, at least two circuits have recognized in other contexts that *§ 414* precludes such a finding. *See Smith v. GTE Corp., 236 F.3d 1292, 1313 (11th Cir. 2001)* (concluding that *§ 414* counsels against a determination that the FCA completely preempts telecommunications customers' claims against a telecommunications service provider's fraudulent conduct in leasing telephones and related equipment); *Marcus, 138 F.3d at 54* (concluding that *§ 414*'s savings clause counsels against a determination that the FCA completely preempts wireless service customers' claims against a wireless service provider based on the provider's deceptive billing and false advertising). Because there is no evidence that Congress intended the FCA to provide the exclusive remedy for claims like those of the Pinney plaintiffs, and because there is evidence that Congress intended to preserve state law claims such as the ones asserted in these cases, we conclude that these claims do not arise under federal law through the doctrine of complete preemption. Because the Pinney plaintiffs' claims do not arise under federal law, the district court lacked jurisdiction over them, making removal improper.

III.

After the district court denied the Pinney plaintiffs' motion to remand their four cases to state court, it dismissed all five cases, including the one brought by the Naquin plaintiffs, on the ground that the claims are preempted by the FCA. Because the district court lacked subject matter jurisdiction over the four cases brought by the Pinney plaintiffs, the district court had no power to dismiss them. However, as we noted earlier, the district court has diversity

jurisdiction over the case brought by the Naquin plaintiffs. *See 28 U.S.C. § 1332(a)*. We must therefore review the district court's order granting Nokia's motion to dismiss the claims of the Naquin plaintiffs.

A.

Before we address the substance of the dismissal, we consider the Naquin plaintiffs' argument that the district court erred in taking up Nokia's motion to dismiss their case. They first contend the dismissal should be vacated because there is no subject matter jurisdiction over the other four cases (the Pinney plaintiffs' cases) that were consolidated with their case. The Naquin plaintiffs argue that if the district court had not erred in failing to recognize that it lacked jurisdiction over the cases of the Pinney plaintiffs, only the Naquin case would have remained, and Nokia's motion to dismiss would not have been considered due to lack of venue over the lone remaining case. According to the Naquin plaintiffs, the district court's error also denied them the procedural right to petition the JPML or the district court for a re-transfer of their case to the transferor court, the United States District Court for the Eastern District of Louisiana. Finally, the Naquin plaintiffs argue that the district court should not have considered the motion to dismiss because it had been denied by the transferor court prior to transfer.

There is no merit to the argument that venue over the Naquin plaintiffs' case in the District of Maryland was improper due to the lack of federal jurisdiction over the other four consolidated cases. The statute authorizing transfer (and consolidation) of multidistrict actions, *28 U.S.C. § 1407*, is a venue statute that allows the JPML to override a plaintiff's choice of forum when three factors are present: (1) "one or more common questions of fact are pending in different districts," (2) a transfer would serve "the convenience of parties and witnesses," and (3) a transfer would "promote the just and efficient conduct of [the] actions." *28 U.S.C. §*

1407(a); see also In re Vernitron Secs. Litig., 462 F. Supp. 391, 394 (J.P.M.L. 1979) ("Nor can the policies behind venue provisions designed to operate in the context of single independent actions prevail, in a multidistrict context, over the Panel's statutory mandate to weigh the interests of all the plaintiffs and all the defendants and to consider multidistrict litigation as a whole in light of the purposes of the law."). Transfer, of course, may be ordered only for the purpose of "coordinated or consolidated pretrial proceedings." *28 U.S.C. § 1407(a).*

In the present cases, the JPML, after noting the presence of common questions of fact, found that "centralization . . . in the District of Maryland [would] serve the convenience of the parties and witnesses and [would] promote the just and efficient conduct of the litigation, while accordingly being necessary in order to avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary." *In Re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, No. 1421 (J.P.M.L. Oct. 31, 2001) (order consolidating and transferring the cases to the District of Maryland). Because these findings satisfied the prerequisites for transfer, and because the proceedings were still in the pretrial stage, venue in the District of Maryland was proper. The Naquin plaintiffs essentially seek to add an additional requirement that subject matter jurisdiction must exist over all transferred and consolidated cases for venue to be proper in the transferee court. There is no basis for this requirement in either the multidistrict litigation statute or the case law.

The Naquin plaintiffs next argue that they were denied their procedural right to request a remand to the Eastern District of Louisiana as a result of the district court's error in finding subject matter jurisdiction over the cases brought by the Pinney plaintiffs. We disagree. At any point in the district court proceedings, the Naquin plaintiffs could have

petitioned the JPML directly for a remand, or they could have requested that the district court suggest a remand to the JPML. J.P.M.L. Rule 7.6(c)(i), (ii); *see also In re Roberts, 178 F.3d 181, 184 (3d Cir. 1999)* (noting that once a case is transferred, only the JPML, and not the transferee court, has the authority to remand the case to the transferor court). The Naquin plaintiffs never moved the JPML for a remand nor asked the district court to suggest remand to the JPML. Because these plaintiffs failed to raise the remand issue with either the JPML or the district court, we consider the issue waived for purposes of this appeal. *See Holland v. Big River Minerals Corp., 181 F.3d 597, 605 (4th Cir. 1999)* ("Generally, issues that were not raised in the district court will not be addressed on appeal.").

Finally, the Naquin plaintiffs argue that the district court's dismissal order should be vacated because Judge Lemelle of the Eastern District of Louisiana had denied, prior to transfer, motions to dismiss filed by some of the defendants. The Naquin plaintiffs claim that a transferee court may reconsider a prior order of a transferor court only when: (1) there is an intervening change in the law, (2) there is newly discovered (material) evidence, or (3) reconsideration is necessary to correct a clear error of law or prevent manifest injustice. The two cases relied on by the Naquin plaintiffs do not support such a constricted view of a transferee court's authority. In each of the cases, *Microbix Biosys., Inc. v. Biowhittaker, Inc., 184 F. Supp. 2d 434, 436 (D. Md. 2000)*, and *Potter v. Potter, 199 F.R.D. 550, 552 (D. Md. 2001)*, the district court was ruling on a motion for reconsideration of its own order. The rules of constraint urged by the Naquin plaintiffs make sense when a district court is asked to reconsider its own order. "Were it otherwise, then there would be no conclusion to motions practice, each motion becoming nothing more than the latest installment in a potentially endless serial that would exhaust the resources of the parties and the court -- not to mention its

patience." *Potter, 199 F.R.D. at 553.* This same constraint is not always justified in the multidistrict litigation context, where there is a need for consistent treatment of consolidated cases. *See Astarte Shipping Co. v. Allied Steel & Export Svc., 767 F.2d 86, 87 (5th Cir. 1985)* ("The transferee court has the power and the obligation to modify or rescind any orders in effect in the transferred case which it concludes are incorrect."); *Degulis v. LXR Biotech., Inc., 928 F. Supp. 1301, 1309 (S.D.N.Y. 1996)* ("A transferee court in a multi-district litigation thus has the power to modify interlocutory orders entered by the transferor court prior to transfer under *28 U.S.C. § 1407.*") (citation omitted). Here, Judge Lemelle, in denying the motions to dismiss, denied them without prejudice and explicitly acknowledged that the issue of federal preemption could be revisited later in the litigation. In sum, the district court did not err in considering Nokia's motion to dismiss the Naquin case.

B.

In their amended complaint the Naquin plaintiffs allege both state and federal claims and seek the same remedy as the Pinney plaintiffs, headsets for wireless telephones.[3] We now consider whether the Naquin plaintiffs' state law claims are preempted by the FCA. Under the *Supremacy Clause* a state law that "interferes with, or is contrary to" federal law is invalid. *Free v. Bland, 369 U.S. 663, 666, 8 L. Ed. 2d 180, 82 S. Ct. 1089 (1962).* There are three theories under which

---

[3] For their federal claims the Naquin plaintiffs allege that Nokia has violated the Magnuson-Moss Warranty Improvement Act, *15 U.S.C. § 2310.* More specifically, they allege that Nokia breached the implied warranty of fitness for a particular purpose by failing to provide headsets and by engaging in deceptive trade practices in failing to disclose the harmful effects of RF radiation from wireless telephones. This failure to disclose renders the manufacturers' express warranties for wireless telephones misleading, the amended complaint alleges. The district court appeared to dismiss the Naquin plaintiffs' amended complaint entirely on preemption grounds, even though federal claims are also alleged.

Congress preempts state law. First, under express preemption Congress expressly declares its intent to preempt state law. *S. Blasting Svcs., Inc. v. Wilkes County, 288 F.3d 584, 590 (4th Cir. 2002)* (citing *Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 713, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985)*). Second, under field preemption Congress impliedly preempts state law when "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it." *Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992)* (internal quotation marks and citations omitted). Third, under conflict preemption Congress impliedly preempts state law when it "actually conflicts with federal law." *Hillsborough, 471 U.S. at 713*. We must remember that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996)* (internal quotation marks and citations omitted). Further, "consideration under the *Supremacy Clause* starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana, 451 U.S. 725, 746, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981)* (citation omitted). This presumption against preemption is particularly strong when Congress legislates "'in a field which the States have traditionally occupied,'" such as health and safety.[4] *Medtronic, 518 U.S. at 485*

---

[4] The district court decided that the presumption against preemption does not apply here because the Naquin plaintiffs' claims relate to wireless telecommunications, an area where, according to the court, "'there has been a history of significant federal presence.'" *In re Wireless Tel. Radio Frequency Prods. Liab. Litig., 248 F. Supp. 2d 452, 463 (D. Md. 2003)* (quoting *United States v. Locke, 529 U.S. 89, 108, 146 L. Ed. 2d 69, 120 S. Ct. 1135 (2000)*). In *Locke* the Supreme Court concluded that the State of Washington's oil tanker regulations were not entitled to the presumption against preemption because the regulations governed national and international maritime commerce, an area long regulated by Congress. *529 U.S. at 108*. The district court's reliance on *Locke* is

(quoting *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)*).

1.

Nokia argues that the Naquin plaintiffs' claims are expressly preempted by two provisions of the FCA. The first provision appears in *§ 332(c)(7)*, which is aimed at the "preservation of local zoning authority" over "decisions regarding the placement, construction, and modification of personal wireless service facilities." *47 U.S.C. § 332(c)(7)(A)*. Nokia asserts that the claims are expressly preempted by *§ 332(c)(7)(B)(iv)*, which limits the general authority of local bodies as follows: "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions" if the facilities comply with the FCC's RF radiation standards. *47 U.S.C. § 332(c)(7)(B)(iv)*. This section applies only to "personal wireless service facilities," a term defined in circular fashion as "facilities for the provision of personal wireless services."

---

misplaced because there is not the same federal presence in the wireless telecommunications area as there is in the area of maritime commerce. States continue to have considerable authority in the wireless telecommunications area. *See, e.g., 47 U.S.C. § 332(c)(3)(A)* (providing that states may not regulate "the entry of or rates charged by" wireless service providers, but that they may regulate "other terms and conditions" of wireless service); *47 U.S.C. § 332(c)(7)* (providing that state authority to regulate the "placement, construction, and modification of personal wireless service facilities" is preserved except in specific circumstances). While wireless telephones must meet the FCC's specifications and be authorized by the FCC before they can be sold, *see 47 C.F.R. § 2.803*, these provisions do not provide a remedy to someone injured by a defective wireless telephone. "The presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedy exists." *Abbot v. Am. Cyanamid Co., 844 F.2d 1108, 1112 (4th Cir. 1988)* (citation omitted).

47 U.S.C. § 332(c)(7)(C)(ii). The statute does not define the term "facilities" or "facility." We must therefore determine, as a matter of first impression, whether a wireless telephone constitutes a "facility" for purposes of *§ 332(c)(7)(B)(iv)*. We conclude that it does not.

"If the 'statutory language is unambiguous and the statutory scheme is coherent and consistent,' our inquiry ends." *Alexander S. v. Boyd, 113 F.3d 1373, 1383 (4th Cir. 1997)* (quoting *Robinson v. Shell Oil Co., 519 U.S. 337, 342, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997)*). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson, 519 U.S. at 341*. Although "facility" as used in *§ 332(c)(7)(B)(iv)* is not defined, when the specific and broader contexts of its use are considered, it becomes plain that a wireless telephone is not a facility. The dictionary defines "facility" as "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or serve or facilitate some particular end." Webster's Third New International Dictionary 812 (1993). If the dictionary definition was used here, a facility would be something "built, constructed, installed, or established" to provide personal wireless service. This might arguably include a wireless telephone. We continue our inquiry, however, and examine the specific statutory context in which the term "facility" is used. *Section 332(c)(7)* is entitled, "Preservation of local zoning authority" and provides, as the general rule, that "nothing [in the statute] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." *47 U.S.C. § 332(c)(7)(A)*. The section goes on to provide limitations to the general rule, and in doing so attempts to strike a balance between the states' interests in regulating

land use and the federal government's interest in facilitating the development of wireless telephone service. *See Omnipoint Communications Enters., L.P. v. Newtown Township, 219 F.3d 240, 242-43 (3rd Cir. 2000)*; *Town of Amherst v. Omnipoint Communications Enters., Inc., 173 F.3d 9, 13 (1st Cir. 1999)*. Because *§ 332(c)(7)* deals with the authority of the states *over zoning and land use*, we conclude that Congress intended the term "facility" to mean a structure or object, such as a base station or a mobile telephone switching office (MTSO), that falls within the states' zoning or land use authority. This interpretation excludes devices, such as wireless telephones, that are completely portable and have no attachment to land. The broader context in which the term "facility" is used also supports the interpretation that the term does not include wireless telephones. As we discuss below, *see infra* at 33, Congress enacted the entire *§ 332* to ensure the availability of a nationwide network of wireless service coverage. Consistent with this objective, a facility should, at the very least, be part of the infrastructure (a base station or an MTSO, for example) that provides wireless service coverage. A wireless telephone, however, only accesses a wireless service provider's network of coverage; a wireless telephone itself is not part of the underlying infrastructure. Because both the specific context of the use of the term "facilities" in *§ 332(c)(7)* and the broader context (and purpose) of *§ 332* reveal that a wireless telephone is not a facility under *§ 332(c)(7)(B)(iv)*, state tort claims relating to the manufacture and sale of wireless telephones are not expressly preempted by *§ 332(c)(7)(B)(iv)*.

Nokia next argues that *§332(c)(3)(A)* expressly preempts the Naquin plaintiffs' claims. This section prohibits a state or local government from regulating "the entry of or the rates charged by any commercial mobile service," but allows it to regulate "other terms and conditions of commercial mobile services." *47 U.S.C. §332(c)(3)(A)*. Nokia argues that the

Naquin plaintiffs seek to use state law to regulate technical specifications for wireless telephones; this, Nokia says, would hinder entry into the commercial mobile service market because the FCC requires that wireless service providers certify that they are using only FCC-authorized equipment. Because Nokia cites to the licensing provisions dealing with personal communications services (PCS), a specific type of commercial mobile service, we understand Nokia's argument to assert that state regulation of wireless telephone specifications constitutes a barrier to entry for PCS providers.[5]

While *§ 332(c)(3)(A)* is unclear as to what precisely constitutes a barrier to entry into the PCS market, we conclude that the relief sought by the Naquin plaintiffs (a headset requirement) is not such a barrier. To begin with, the PCS market is a market for wireless *service*. Wireless service providers use base stations and MTSOs to create a network of coverage, a network that wireless telephone users generally pay a fee to access. The FCC licenses portions of the radio spectrum to wireless service providers so they can provide PCS coverage, *see 47 C.F.R. § 24.1(a), (b)*, and one of the main requirements for the grant of a license is that the licensee must construct enough base stations to provide coverage to the area for which it receives a license. *47 C.F.R.*

---

[5] There are basically two competing modes of wireless communications, cellular services and PCS. Malcom J. Tuesly, Note, *Not in My Backyard: The Siting of Wireless Communications Facilities, 51 Fed. Comm. L.J. 887, 888 (1999)*. Cellular systems operate in the 834-MHz to 894-MHz range, and PCS systems operate in the 1850-MHz to 1990-MHz range. Marshall Brain & Jeff Tyson, *How Cell Phones Work, at* http://electronics.howstuffworks.com/cell-phone.htm/printable (last visited Jan. 24, 2005). "As demand for cellular service has outgrown the available radio spectrum used for cellular signals, the wireless industry has turned to PCS, which utilizes digital technology that triples the capacity of traditional cellular systems." Tuesly, *supra at 888*.

§ § 24.103, 24.203. Accordingly, in order for state law to constitute a barrier to entry, it must, at a minimum, obstruct or burden a wireless service provider's ability to provide a network of wireless service coverage. *See, e.g., Bastien v. AT&T Wireless Svcs., Inc., 205 F.3d 983 (7th Cir. 2000)* (concluding that an action brought under state law to challenge the number of base stations in a coverage area constitutes a barrier to entry and is prohibited by *§ 332(c)(3)(A)*).

A headset requirement for wireless telephones would not constitute a barrier to entry into the PCS market because wireless telephones are only used to access a wireless service provider's network of coverage; the telephones themselves do not provide the actual coverage. It is true that wireless service providers commonly market wireless telephones in conjunction with wireless service packages, and the wireless telephones that they sell must comply with federal RF radiation standards. *See 47 C.F.R. § 24.52.* Nevertheless, a wireless service provider's choice to bundle service packages and telephones does not mean that a headset requirement would affect its ability to enter into the wireless service market or to provide a network of wireless service coverage. Furthermore, notwithstanding Nokia's assertion, we find nothing in the regulations that requires a wireless service provider to certify, as a condition for obtaining a license to provide PCS, that the wireless telephones *used* within its coverage area comply with the FCC's RF radiation standards. This certification is generally undertaken by the manufacturer of the telephones when it requests equipment authorization. *See 47 C.F.R. § § 24.51(b); 24.52.* Because the relief sought by the Naquin plaintiffs would not be a barrier for wireless service providers seeking to enter the PCS market, *§ 332(c)(3)(A)* does not expressly preempt the claims of the Naquin plaintiffs.

2.

We also hold that the Naquin plaintiffs' claims are not preempted under the doctrines of conflict preemption and field preemption. As noted above, a state statute can be set aside by conflict preemption "when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough, 471 U.S. at 713* (internal quotation marks and citations omitted). Again, there is a strong presumption against preemption when the federal government regulates in areas traditionally left to the states, such as health and safety. *Medtronic, 518 U.S. at 485.*

The district court concluded that the Naquin plaintiffs' claims are preempted because their cases stand as an obstacle to "Congress' objectives of achieving national uniformity in wireless telecommunications services and striking a balance between the proliferation of wireless services and the need to protect the public from any harmful effects of RF exposure." *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig., 248 F. Supp. 2d 452, 463 (D. Md. 2003).* Reasoning that the plaintiffs were essentially seeking to impose a headset requirement or a stricter RF radiation standard, the district court concluded that allowing the cases to go forward would usurp the regulatory authority Congress entrusted to expert federal agencies that had already confronted these issues. *Id.* The district court relied on *§ 332 of the FCA* to find a sweeping congressional objective of ensuring that all equipment used in connection with wireless telecommunications be subject to exclusive national RF radiation standards that have the effect of precluding state regulation on the subject. *Id. at 464* (citing *In re Wireless I, 216 F. Supp. 2d at 483-87*).

We conclude that the district court erred because the FCA provides no evidence of such an objective. Congress

enacted *§ 332* to ensure the availability of a nationwide network of wireless service coverage, more specifically, to develop the infrastructure necessary to provide wireless services. Thus, *§ 332* (1) provides factors that the FCC must consider in managing the spectrum used for wireless services, *47 U.S.C. § 332(a)*; (2) classifies wireless service providers that provide wireless service to the public for profit as "common carriers" (subjecting them to numerous duties under the FCA), *47 U.S.C. § 332(c)(1)(A)*; (3) prevents states from regulating "the entry of or the rates charged by" wireless service providers, *47 U.S.C. § 332(c)(3)(A)*; and (4) limits in certain respects the ability of states and local zoning authorities to regulate the "placement, construction, and modification" of facilities that provide wireless service, *47 U.S.C. § 332(c)(7)*.

We do not infer from *§ 332* the congressional objective of achieving preemptive national RF radiation standards for wireless telephones. First, *§ 332* does not address the subject of wireless telephones, let alone the more specific issue of the permissible amount of RF radiation from wireless telephones. The FCC's RF radiation standards for wireless telephones were not promulgated pursuant to a mandate contained in *§ 332 of the FCA*, but rather pursuant to the *National Environmental Policy Act*'s mandate that all agencies assess the environmental impact of their actions. For the FCC, the action was authorizing transmitters that emit RF radiation. *In re Guidelines for Evaluating the Envt'l Effects of Radiofrequency Radiation, 11 FCC Rcd. 15123, 15125 (1996)*. The complete absence of any provision addressing wireless telephones counsels against a finding that *§ 332* evidences a congressional goal of achieving preemptive national RF radiation standards for wireless telephones.

Second, in pursuing its objective of ensuring the availability of a nationwide network of wireless service

coverage, Congress has been very careful to preempt expressly only certain areas of state law, preserving the remainder for state regulation. For example, *§ 332(c)(3)(A)* prohibits states from regulating "the entry of or the rates charged by" wireless service providers, but explicitly provides that states may still regulate "the other terms and conditions of commercial mobile service." *47 U.S.C. § 332(c)(3)(A).* And *§ 332(c)(7)* preserves a good measure of the states' authority over decisions regarding "placement, construction, and modification of personal wireless service facilities." *47 U.S.C. § 332(c)(7)(A).* Consistent with this conscious and careful effort to carve out the areas of state laws that it wants to preempt, Congress has specifically allowed for preemptive national RF radiation standards only for personal wireless service facilities. *Section 332(c)(7)(B)(iv)* provides that state and local zoning authorities may not "regulate the placement, construction, and modification of personal wireless service facilities" on the basis of RF emissions as long as the facilities comply with the FCC's RF radiation standards. This specificity as to the preemptive nature of federal RF radiation standards for personal wireless service facilities weighs against a finding that Congress has an implicit goal of making preemptive the RF radiation standards for all other types of wireless telecommunications equipment, including wireless telephones.

Third, there are two applicable savings clauses. There is the general savings clause of the FCA, which provides that "nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." *47 U.S.C. § 414.* And there is the savings clause in *section 601(c)(1) of the Telecommunications Act of 1996.* This Act added *47 U.S.C. § 332(c)(7),* which preempts some of the states' authority to regulate the location of base stations (not wireless telephones); the savings clause,

however, provides that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided . . . ." Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143. These savings clauses counsel against any broad construction of the goals of *§ 332* and *§ 332(c)(7)* that would create an implicit conflict with state tort law.

Having determined that the FCA provides no evidence of a congressional objective to ensure preemptive national RF radiation standards for wireless telephones, we next examine whether the relief sought by the Naquin plaintiffs would stand as an obstacle to Congress' actual goal of establishing a nationwide network of wireless telephone service coverage. We conclude that it would not. It is difficult to understand how a headset requirement (the specific relief sought) would affect the establishment of a nationwide wireless service network or the availability of wireless service coverage. Wireless service providers generally provide wireless service coverage through a network of base stations that are coordinated by MTSOs. A wireless telephone user purchases a service plan from a wireless service provider, and the provider assigns the user a MIN and a SID, which allow the user to access this network of base stations and MTSOs. While wireless telephones access the network, they are not part of the infrastructure; accordingly, a headset requirement would not stand as an obstacle to Congress's goal of achieving nationwide coverage.

Finally, we reject Nokia's argument that the Naquin plaintiffs' claims are preempted on the basis of field preemption. As our previous discussion indicates, the FCA does not "so thoroughly occupy [the] legislative field [of wireless telecommunications] as to make reasonable the inference that Congress left no room for the states to supplement it." *Cipollone, 505 U.S. at 516*. There is no

evidence that Congress intended that state law claims, such as those asserted by the Naquin plaintiffs, be swept aside.

IV.

For the foregoing reasons, we reverse the district court's order denying the consolidated motion to remand made by the plaintiffs in the Pinney, Farina, Gilliam, and Gimpelson cases. Because federal subject matter jurisdiction does not exist over these four cases, we return them to the district court for remand to the state courts in which they originated. We also reverse the district court's order dismissing the Naquin plaintiffs' case as preempted by the FCA. That case is remanded to the district court for further proceedings.

REVERSED AND REMANDED

DISSENT BY: Jackson L. Kiser

DISSENT: KISER, Senior District Judge, dissenting:

I dissent because, like the district court in its well-researched and well-reasoned opinion, I believe the case cannot be resolved without proving that the FCC's RF radiation emission standards are too high to protect the consuming public. This conclusion stems from a reading of the plaintiffs' complaint -- not from any defense that the defendants may assert.

The majority opinion reviews in some detail what elements of the seven claims must be proved and concludes that none of the claims are dependent on whether or not the wireless telephones comply with the FCC standards. Apparently, the majority believes that the plaintiffs can prove their prima facie case of all seven claims without reference to the FCC standards regulating RF radiation emissions in wireless telephones and without proving that those standards are insufficient and invalid. I disagree. The plaintiffs are not trying this case in a vacuum. The FCC has

enacted a uniform, nationwide regulatory scheme pertaining to wireless telephones which is the result of a thorough and complex rule-making process. The final rules reflect what the FCC believes will maintain the proper balance between the interest in promoting wireless communication throughout the country and the interest in protecting the health and safety of all consumers. The plaintiffs will not be able to ignore these standards. In proving their prima facie case for each claim, the plaintiffs will have to prove the unreasonableness of the RF radiation emitted by FCC-compliant wireless telephones. The plaintiffs will thus have to establish that the FCC standards are insufficient. It is well-settled that a suit to invalidate a federal regulation arises under federal law. *See Cahnmann v. Sprint Corp., 133 F.3d 484, 488 (7th Cir. 1998)*. In this case, the FCC standards' validity vel non is a matter of plaintiffs' proof by the very words of the complaint which purport to attack the FCC regulations. This thinly-disguised attack on the validity of the FCC standards raises a substantial federal question.

The plaintiffs attack the FCC standards in three ways. First, the plaintiffs challenge the sufficiency of the FCC standard. The plaintiffs allege that the defendants' wireless telephones, which comply with the FCC standard, do not give adequate protection from RF radiation. Although the plaintiffs have not indicted the FCC standard by name, that is the effect of their allegations.

Second, the plaintiffs challenge the expertise of the FCC. The plaintiffs allege that defendants were dishonest when they stated to the public that "cell phones fall within the safety standards of the [FCC]." P 79. Plaintiffs arrive at the conclusion that the above statement is false because the defendants "omitted the fact that the FCC had declared it does not consider itself the 'expert agency' for evaluating health effects," even though the FCC relied on experts in evaluating health effects, one of which was the FDA. *See*

Cellular Phone Task Force v. FCC, 205 F.3d 82, 88 (2nd Cir. 2000). This allegation is incorporated by reference in all of the plaintiffs' claims but is particularly pertinent to Count VI (Fraud) and Count VII (Fraud by Concealment). These allegations form a part of plaintiffs' factual basis on which these two counts are based. These are facts plaintiffs must prove along with any other alleged misrepresentations to sustain the allegations in the complaint. Therefore, the plaintiffs call into question the expertise of the FCC and the sufficiency of its standards.

Third, the plaintiffs question the procedure by which the FCC developed the regulations. Specifically, the plaintiffs challenge the data on which the FCC relied. In the rule-making process, the FCC relied in part on standards of the American National Standards Institute ("ANSI"). *Id.* Plaintiffs allege that the defendants "obtained and exercised control over the [ANSI] Committee responsible for developing safety standards for RFR emitting devices." P 71. The plaintiffs are therefore attacking the rule-making process that the FCC used in developing these standards. Because the plaintiffs are making a direct attack upon the validity and sufficiency of the FCC regulations, their claims arise under federal law.

The majority finds that this case fails to raise a substantial federal question because it does not rise or fall on the resolution of a question of federal law. In support of this conclusion, the majority points out the holding of the Supreme Court that the "mere presence of a federal issue in a state cause of action does not confer federal question jurisdiction." *Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 813, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986)*. The situation in *Merrell Dow*, however, is inapposite to the one in this case. In *Merrell Dow*, the plaintiffs were supporting the *Federal Food, Drug, and Cosmetic Act* and claiming a violation of that act was

negligence. Here, the plaintiffs are seeking to completely undo the FCC standard. Claims with the potential for severely limiting or eliminating a federal regulatory scheme raise a much more substantial federal question than those that merely seek to inure to the benefit of such a scheme. On the other hand, I find this case very similar to our holding in *Ormet Corp. v. Ohio Power Co.* In *Ormet*, the plaintiff's claim was couched in traditional commercial litigation language, but we held that because the plaintiffs had to make reference to the Clean Air Act to define one of the terms of the contract there was a sufficient nexus to the Clean Air Act to support federal question jurisdiction. *Ormet Corp. v. Ohio Power Co., 98 F.3d 799, 807 (4th Cir. 1996)*. The same logic applies here. Although the FCC regulation must be dealt with by the plaintiffs in a negative manner, its inadequacy is a fact that plaintiffs must prove. This provides a sufficient nexus to support federal question jurisdiction.

Moreover, the need for uniformity in a federal regulatory scheme heightens the importance of the federal question. In *Ormet*, we held that "where the resolution of a federal issue in a state-law cause of action could, because of different approaches and inconsistency, undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest justifying the exercise of jurisdiction by federal courts." *Id.* (citing *Martin v. Hunter's Lessee, 14 U.S. 304, 347-48, 4 L. Ed. 97 (1816)*). Here, plaintiffs are not merely raising a claim which *may* undermine a federal regulatory scheme through inconsistent interpretations; rather they are raising claims which, if successful, *will* result in the complete invalidation of federal regulatory standards. This presents a substantial federal question.

This Court has repeated the call by Justice Cardozo for "principled, pragmatic distinctions" in determining federal question jurisdiction. *Columbia Gas Transmission Corp. v.*

Drain, 191 F.3d 552, 558 (4th Cir. 1999). In the words of Justice Cardozo, "what is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside." *Id.* (quoting *Gully v. First National Bank, 299 U.S. 109, 117-18, 81 L. Ed. 70, 57 S. Ct. 96 (1936)*). Although we have affirmed our commitment to Justice Cardozo's words, the majority today does not adhere to the principles espoused in these words. We should not dismiss this case as lacking federal question jurisdiction simply because the plaintiffs have filed claims cloaked in state law language. Instead, we should use common sense and recognize that plaintiffs' claims directly implicate a federal regulatory scheme and threaten to undermine that same scheme. I would affirm the district court's finding of federal question jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

IN RE WIRELESS TELEPHONE RADIO FREQUENCY EMISSIONS PRODUCTS LIABILITY LITIGATION; THIS DOCUMENT RELATES TO: Pinney, et. al. v. Nokia, et. al. (D. Md.); Farina v. Nokia, et. al. (E.D. Pa.); Gilliam, et. al. v. Nokia, Inc., et. al. (S.D.N.Y.); Gimpelson v. Nokia, Inc., et. al. (N.D. Ga.); Naquin, et. al. v. Nokia, Inc., et. al. (E.D. La.)

MDL No. 1421, Civil Action No. 01-MD-1421

216 F. Supp. 2d 474; 2002 U.S. Dist. LEXIS 11144

June 21, 2002, Decided

DISPOSITION: Plaintiffs' consolidated and renewed motion for remand DENIED.

COUNSEL: For J. DOUGLAS PINNEY, PATRICIA S. COLONELL, plaintiffs: H. Thomas Howell, Howell & Gately, Baltimore, MD USA.

For PATRICIA S. COLONELL, FRANCIS J. FARINA, GARRETT J. NAQUIN, plaintiffs: H. Russell Smouse, Law Offices of Peter G Angelos, Baltimore, MD USA.

For PATRICIA S. COLONELL, CRYSTALL GILLIAM, DIMITRI MACK, plaintiffs: Peter G. Angelos, Law Offices of Peter G Angelos, Baltimore, MD USA.

For PATRICIA S. COLONELL, plaintiff: John A. Pica, Jr., Law Offices of Peter G Angelos, Baltimore, MD USA.

For RIEDY GIMPELSON, plaintiff: Michael Weinstock, Law Office, Atlanta, GA USA.

For SARAH DAHLGREN, consolidated plaintiff: Burton Finkelstein, Tracy Diana Rezvani, Richard Maxwell Volin, Finkelstein Thompson and Loughran, Washington, DC USA.

For NOKIA, INC., defendant: Steven M Zager, Austin Tighe, Brobeck Phleger and Harrison LLP, Austin, TX USA.

For NEC AMERICA, INC., defendant: James P. Ulwick, Kramon and Graham, Baltimore, MD USA.

For NEC AMERICA, INC., defendant: Brian P Quirk, James B Irwin, Irwin Fritchie Urquhart and Moore LLC, New Orleans, LA USA.

For ERICSSON WIRELESS COMMUNICATIONS, INC., defendant: Gregg L Bernstein, Denis J. Charlesworth, Martin Snyder and Bernstein PA, Baltimore, MD USA.

For ERICSSON WIRELESS COMMUNICATIONS, INC., defendant: David T Moran, Charles L Babcock, Ryan C Wirtz, Jackson Walker LLP, Dallas, TX USA.

For SPRINT PCS LIMITED PARTNERSHIP, defendant: Paul S Schleifman, Shook Hardy and Bacon LLP, Washington, DC USA.

For SPRINT PCS LIMITED PARTNERSHIP, defendant: J Stan Sexton, Michael D Moeller, Shook Hardy and Bacon LLP, Kansas City, MO USA.

For AUDIOVOX COMMUNICATIONS CORPORATION, defendant: Mark H Kolman, Leslie R Cohen, Dickstein Shapiro Morin and Oshinsky LLP, Washington, DC USA.

For NEXTEL COMMUNICATIONS, INC., defendant: Sheila L Birnbaum, Skadden Arps Slate Meagher and Flom LLP, New York, NY USA.

For NEXTEL COMMUNICATIONS, INC., defendant: Patrick R. Buckler, Law Office, Baltimore, MD USA.

For NEXTEL COMMUNICATIONS, INC., defendant: Edward M Crane, David L Hanselman, Jr, Skadden Arps Slate Meagher and Flom, Chicago, IL USA.

For NEXTEL COMMUNICATIONS, INC., defendant: Ronald M. Cherry, Law Offices of Ronald M Cherry, Towson, MD USA.

For MATSUSHITA CORPORATION OF AMERICA, SANYO NORTH AMERICA, INC., defendants: Paul D Krause, Wilson Elser Moskowitz Edelman and Dicker LLP, Washington, DC USA.

For MATSUSHITA CORPORATION OF AMERICA, defendant: Laura Nachowitz Steel, Wilson Elser Moskowitz Edelman and Dicker LLP, Washington, DC USA.

For PHILIPS ELECTRONIC NORTH AMERICA CORPORATION, defendant: Raymond B. Biagini, Ray M. Aragon, McKenna Long and Aldridge LLP, Washington, DC USA.

For QUALCOMM INCORPORATED, SONY ELECTRONICS, INC., defendants: George C. Doub, Jr,

William H Murphy, Jr, George C Doub, III, William H Murphy, III, George C Doub PC, Baltimore, MD USA.

For QUALCOMM INCORPORATED, SONY ELECTRONICS, INC., defendants: Francis A Citera, Greenberg Traurig PC, Chicago, IL USA.

For SANYO NORTH AMERICA, INC., defendant: Andrew M Winick, Brown Diffenderffer and Kearney LLP, Baltimore, MD USA.

For AT&T CORP., defendant: Antonia B Ianniello, Stephen Anthony Fennell, Thomas M Barba, Jennifer Quinn Barabanov, Mark F Horning, Stewart A Baker, Steptoe and Johnson LLP, Washington, DC USA.

For VERIZON MARYLAND, INC., VERIZON COMMUNICATIONS, INC., VERIZON WIRELESS, CELLCO PARTNERSHIP, defendants: John Henry Lewin, Jr, Venable Baetjer and Howard LLP, Baltimore, MD USA.

For VERIZON MARYLAND, INC., VERIZON COMMUNICATIONS, INC., VERIZON WIRELESS, CELLCO PARTNERSHIP, defendants: M King Hill, III, Venable Baetjer and Howard LLP, Towson, MD USA.

For VERIZON MARYLAND, INC., VERIZON COMMUNICATIONS, INC., VERIZON WIRELESS, CELLCO PARTNERSHIP, defendants: Laura Owens, Jane Fugate Thorpe, Scott Elder, Alston and Bird LLP, Atlanta, GA USA.

For CELLCO PARTNERSHIP, defendant: Brian Brooks, O'Melveny & Myers LLP, Washington, DC USA.

For CINGULAR WIRELESS LLC, CINGULAR WIRELESS, SBC COMMUNICATIONS, INC., defendants: Thomas C Watson, Curtis S Renner, Watson and Renner, Washington, DC USA.

For CELLULAR ONE GROUP, defendant: Charles L Perry, Arter and Hadden LLP, Dallas, TX USA.

For VOICESTREAM WIRELESS CORPORATION, defendant: Charles P Goodell, Jr, James A. Frederick, Goodell DeVries Leech and Dann LLP, Baltimore, MD USA.

For VOICESTREAM WIRELESS CORPORATION, POWERTEL, INC., POWERTEL PCS, INC., POWERTEL/ATLANTA, INC., defendants: Eugene A Schoon, Sidley Austin Brown & Wood, Chicago, IL USA.

For VOICESTREAM WIRELESS CORPORATION, defendant: Tamar B Kelber, James W Mizgala, Sidley Austin Brown and Wood, Chicago, IL USA.

For C.E.I., INC., defendant: John J Nagle, III, Winn C. Friddell, Bodie Nagle Dolina Smith and Hobbs PA, Towson, MD USA.

For C.E.I., INC., defendant: Elwood E Swam, Hampstead, MD USA.

For BALTIMORE BUSINESS COMMUNICATIONS, INC., defendant: Maureen E Murphy, Murphy and Murphy, Baltimore, MD USA.

For COMCAST/METROPHONE, defendant: Seamus C. Duffy, Drinker, Biddle & Reath, Philadelphia, PA USA.

For RADIFONE, defendant: John A Stewart, Jr, Hulse and Wanek, Mark J Jeansonne, Milling Benson Woodward, New Orleans, LA USA.

For MOTOROLA INC., defendant: Michael E. Yaggy, Kenneth L. Thompson, Anthony Michael Conti, Piper Rudnick LLP, Baltimore, MD USA.

For SOUTHERN TELECOM INC., defendant: Colleen A Hartman, Troutman Sanders LLP, Atlanta, GA USA.

For MITSUBISHI WIRELESS COMMUNICATIONS INCORPORATED, consolidated defendant: Kevin B Getzendanner, Matthew T Covell, Arnall Golden Gregory LLP, Atlanta, GA USA.

JUDGES: Catherine C. Blake, United States District Judge.

OPINION BY: Catherine C. Blake

OPINION:

MEMORANDUM

The plaintiffs in this multidistrict litigation have brought five class actions against defendants in the states of Maryland, Pennsylvania, New York, Georgia, and Louisiana. Each count of each complaint is brought, on its face, under state statutory or common law.[1] Asserting federal jurisdiction under several theories, the defendants filed

---

[1] Each of the five complaints, which are substantially similar in all material respects, asserts some combination of the following state law claims: strict products liability (failure to warn, design or manufacturing defect); violations of state consumer protection laws; breach of implied warranties; negligence; fraud; fraud by concealment; and civil conspiracy. For purposes of this memorandum, the court will use the *Pinney* complaint as representative of the complaints.

notices of removal under *28 U.S.C. § 1441*(b) in all five actions. The Judicial Panel on Multidistrict Litigation transferred the cases to this court. Now pending is plaintiffs' consolidated and renewed motion for remand pursuant to *28 U.S.C. § 1447*(c). The issues have been fully briefed, and a hearing was held on February 15, 2002. For the reasons set forth below, the plaintiffs' motion will be denied.

Plaintiffs purport to represent all cell phone purchasers who have not been diagnosed with brain-related diseases, and who were not provided with headsets when they purchased or leased their telephones. They allege that defendants have negligently and fraudulently endangered the consuming public by providing wireless phones without headsets, knowing that these phones emit unsafe levels of radio frequency ("RF") radiation. Rather than seek a traditional tort or contract remedy on behalf of this strangely defined class, however, plaintiffs ask their respective state courts to: (1) declare wireless phones that are in compliance with the FCC's safety regulations on radio frequency emissions "unreasonably dangerous" under state law when sold without headsets; (2) enjoin defendants from selling FCC-compliant wireless phones without headsets; (3) order defendants to provide free headsets to all wireless telephone users; and (4) order defendants to provide "warnings" to consumers about the "dangers" of using FCC-compliant phones. As illustrated by the relief requested, the plaintiffs' suits, though couched in the language of state tort and contract law, have only one goal -- to challenge in state court the validity and sufficiency of the federal regulations on radio frequency radiation from wireless phones. Because plaintiffs' suits are a disguised attack on federal law in an area of national importance, the court will exercise jurisdiction over plaintiffs' claims.

I. REMOVAL JURISDICTION

State court actions which originally could have been filed in federal court may be removed to federal court by the defendant pursuant to *28 U.S.C. § 1441. Caterpillar v. Williams, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987); Mulcahey v. Columbia Organic Chemicals Company, Inc., 29 F.3d 148, 151 (4th Cir. 1994).* Section 1441 provides, in pertinent part, that "any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." *28 U.S.C. § 1441.* Absent diversity of citizenship, the propriety of removal under § 1441 depends on whether the action is one "arising under the Constitution, laws, or treaties of the United States," as set forth by *28 U.S.C. § 1331. Mulcahey, 29 F.3d at 151; Rosciszewski v. Arete Associates, Inc., 1 F.3d 225, 230 (4th Cir. 1993).*

As the Fourth Circuit has explained:

> In order to determine if an action arises under federal law, we must apply the well-pleaded complaint rule. *See Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987).* This rule 'provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.' *Id.* Because 'the well-pleaded complaint rule applies to the original jurisdiction of the district courts as well as to their removal jurisdiction,' *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 10 n. 9, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983),* a plaintiff 'may

> avoid federal jurisdiction by exclusive reliance on state law' in pleading its case, *Caterpillar, Inc., 482 U.S. at 392.*

Rosciszewski, 1 F.3d at 231; see also J.H.W. Sr., Inc. v. Exxon Co., U.S.A., 921 F. Supp. 1436, 1438 (D. Md. 1996).

Ordinarily, therefore, the plaintiff as "the master of his complaint" may select a state forum by choosing to rely on state law claims only, even if the facts alleged also would support a claim under federal law. *See Franchise Tax Bd., 463 U.S. at 22; Cheshire v. Coca-Cola Bottling Affiliated, Inc., 758 F. Supp. 1098, 1100 (D.S.C. 1990).* While a district court should be cautious in denying defendants access to a federal forum because remand orders are generally unreviewable, *see Cheshire, 758 F. Supp. at 1100;* CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER 14B FED. PRAC. & PROC. JURIS. 3D § 3721 at 351-52 (2002), it is also true that removal jurisdiction raises "significant federalism concerns," and therefore must be strictly construed. *Mulcahey, 29 F.3d at 151 (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 85 L. Ed. 1214, 61 S. Ct. 868 (1941)).* The burden of establishing federal jurisdiction is on the party seeking removal. *Id. (citing Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 66 L. Ed. 144, 42 S. Ct. 35 (1921)).* "If federal jurisdiction is doubtful, a remand is necessary." *Id. (citing In re Business Men's Assur. Co. of America, 992 F.2d 181, 183 (8th Cir. 1993)); see also Cheshire, 758 F. Supp. at 1102.*

Recognizing that the complaint does not on its face allege any federal claims, the defendants seek to invoke three removal doctrines to support federal question jurisdiction: "substantial federal question," "artful pleading," and "complete preemption."[2] The defendants also maintain that,

---

[2] Throughout their pleadings, plaintiffs assert that the complete preemption doctrine is not properly before the court because defendants

in complying with the FCC's regulations on RF emissions from wireless phones, they were "acting under" a federal officer for purposes of *28 U.S.C. § 1442*. The court will address each of defendants' removal arguments in turn.

II. SUBSTANTIAL FEDERAL QUESTION JURISDICTION

"Congress has given the lower federal courts jurisdiction to hear 'only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Interstate Petroleum Corp. v. Morgan, 249 F.3d 215, 219 (4th Cir. 2001) (en banc) (quoting Franchise Tax Bd., 463 U.S. at 27); see also Battle v. Seibels Bruce Ins. Co., 288 F.3d 596, 606-07 (4th Cir. 2002).* As this court recognized in *Maryland v. Phillip Morris Inc., 934 F. Supp. 173, 178 (D. Md. 1996),* the fact that questions of federal law may need to be determined during the course of state litigation is insufficient to confer federal question jurisdiction under the substantial federal question doctrine. Rather, "the existence of federal question jurisdiction must be determined by 'principled, pragmatic distinctions,' and 'careful judgments about the exercise of federal judicial power'; only where the 'federal interest at stake' is substantial will federal jurisdiction lie." *Custer v. Sweeney, 89 F.3d 1156, 1168 (4th Cir. 1996) (quoting Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 813-14, 814 n. 12, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986)).* "The proper test for federal

---

failed to mention it in their removal notices. Defendants, on the other hand, argue that by mentioning "preemption" three times, and extensively citing complete preemption caselaw, they have satisfied the minimal notice pleading required. The court need not resolve this dispute, because its decision to exercise jurisdiction is not based on the complete preemption doctrine.

jurisdiction [is] 'the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote.'" *Mulcahey, 29 F.3d at 152* (*quoting Merrell Dow, 478 U.S. at 813 n.11).*

While "the mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction,"[3] *Merrell Dow, 478 U.S. at 813,* there are a limited number of cases which depend on the resolution of a federal question sufficiently substantial to arise under federal law. *Merrell Dow, 478 U.S. at 808-09; Ormet Corp. v. Ohio Power Co., 98 F.3d 799, 806 (4th Cir. 1996)* (*citing Franchise Tax Bd., 463 U.S. 1, 27-28, 77 L. Ed. 2d 420, 103 S. Ct. 2841); Mulcahey, 29 F.3d at 151.* Generally, when "'the right set up by [a] party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction,' jurisdiction can be had in federal courts." *Ormet, 98 F.3d at 806* (*quoting Osborn v. Bank of United States, 22 U.S. (9 Wheat) 738, 822, 6 L. Ed. 204 (1824)).* In reaching such a determination, the Supreme Court has consistently instructed federal courts to make "sensitive judgments about congressional intent, judicial power, and the federal system." *Merrell Dow, 478 U.S. at 810*[4].

---

[3] Indeed, federal law creates the plaintiff's cause of action in the vast majority, though not all, of cases involving a substantial federal question. *Merrell Dow, 478 U.S. at 808* (*citing Franchise Tax Bd., 463 U.S. at 9); see also Ormet Corp. v. Ohio Power Co., 98 F.3d 799, 805 (4th Cir. 1996).* The cause of action may be expressly created (*i.e.*, apparent from the language of the statute), or implied. *Merrell Dow, 478 U.S. at 810-811; Ormet, 98 F.3d at 805.*

[4] Plaintiffs contend that the Supreme Court's decision in *Merrell Dow* precludes application of the substantial federal question doctrine to the present case. The court disagrees. In *Merrell Dow*, the Court considered whether to exercise jurisdiction over a state court action brought by consumers against a drug manufacturer, based in part on the theory that the manufacturer's alleged violation of the Food Drug and Cosmetic Act ("FDCA") constituted negligence. Writing for the majority, Justice

The defendants argue that removal is warranted because the plaintiffs' claims will require the resolution of substantial

---

Stevens articulated the question before the court as "whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one 'arising under the Constitution, laws, or treaties of the United States,'" for the purposes of federal jurisdiction. *Merrell Dow, 478 U.S. at 805* (*quoting 28 U.S.C. § 1331).* Noting that Congress did not intend a private federal remedy for violations of the FDCA, *id. at 810,* the Supreme Court summed its holding in *Merrell Dow* in this manner:

We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal question jurisdiction.
Merrell Dow, 478 U.S. at 814.

In the present case, however, plaintiffs have not challenged the "violation of a federal statute." Rather, they dispute the sufficiency of the regulations carrying out the statute itself. Congress has provided several federal causes of action that protect plaintiffs' right to do so. A cause of action is available to plaintiffs, for example, under the FCC's rules of practice and procedure, which provide that "any interested person may petition for the issuance, amendment, or repeal of a rule or regulation." *47 C.F.R. § 1.401(a).* Since federal appellate courts have exclusive jurisdiction over the review of FCC rules and orders, judicial review of an FCC decision declining to impose stricter safety regulations, such as a headset requirement, would be conducted in federal court. *47 U.S.C. § 402*(a); *28 U.S.C. § 2342*(1). Section 10(a) of the Administrative Procedures Act ("APA") also provides plaintiffs a federal remedy by allowing private citizens to challenge an agency's NEPA compliance in federal district court. *See, e.g., Sierra Club v. Slater, 120 F.3d 623, 630-31 (6th Cir. 1997); Muhly v. Espy, 877 F. Supp. 294, 298 (W.D. Va. 1995).* Although these provisions may not provide the plaintiffs with a cause of action against these defendants, they demonstrate Congressional intent to support the plaintiffs' right to adequate protection from unsafe levels of RF radiation, which is, as discussed more fully elsewhere in this memorandum, the only interest at stake in this litigation. Thus, to the extent that *Merrell Dow's* requirement of a federal private remedy is applicable, *see Mulcahey, 29 F.3d at 152,* it is met in the present case.

questions of federal law under the Federal Communications Act of 1934 ("FCA"), *47 U.S.C. § 151, et. seq.* The court agrees. In the FCA, Congress explicitly instructed the FCC to set national standards regulating the levels of radio frequency emitted from telecommunication facilities. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 704(b). As a result, after notice and lengthy public proceedings, the FCC promulgated safety regulations that clearly and specifically delineate the levels of RF emissions that will be allowed from wireless phones:

> Limits for General Population/ Uncontrolled exposure: 0.08 W/kg as averaged over the whole-body and spatial peak SAR not exceeding 1.6 W/kg as averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the hands, wrists, feet and ankles where the spatial peak SAR shall not exceed 4 W/kg, as averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube).

47 C.F.R. 2.1093(d)(2). Defendants must comply with the RF safety requirements in *47 C.F.R. 2.1093(d)(2)* in order to make their phones available to the public.

In determining whether plaintiffs' claims necessarily depend on substantial issues of federal law, the court must consider the allegations made and relief requested in plaintiffs' complaints. Before doing so, however, the court will discuss the comprehensive nature of federal regulation of wireless service to put the matter before it in context.

1. Federal Regulation of RF Emissions from Wireless Phones

Congress asserted federal control over all interstate wire and radio communications systems and established the

Federal Communications Commission ("FCC" or "the Commission") as the sole authority for licensing radio facilities and regulating the technical aspects of radio communications in the Federal Communications Act of 1934 ("FCA"), *47 U.S.C. § 151.* See In re an Inquiry into the *Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, 86 F.C.C.2d 469, P 80 (1981)* (Def. Appendix, Tab 1) (hereinafter "Cellular Communications Systems") ("In enacting such legislation Congress has determined that overall management of the radio spectrum and the licensing of radio facilities are areas within the exclusive jurisdiction of the Federal government."). Pursuant to this exclusive authority, the FCC has issued licenses and set the technical standards for wireless telecommunications since the inception of commercial wireless telephone service. *See Cellular Communications Systems,* PP 86-115; *47 C.F.R. § 20.3.* The FCC currently licenses all equipment used to provide wireless service, including wireless hand-held telephones, and regulates the radiated power levels from all licensed devices, both stationary and portable. *47 C.F.R. § § 2.901, 1.1307, 2.1093, 2.1091.*

In promulgating licensing and technical rules to govern wireless service, one of the FCC's overriding goals is to design cellular service in a manner that will achieve nationwide compatibility. *Cellular Communications Systems, 86 F.C.C.2d 469 at P 79.* "In this regard [the FCC] has expressly stated that a cellular subscriber traveling outside of his or her local service area should be able to communicate over a cellular system in another city." *Id.* Recognizing the danger that piecemeal state regulation might pose to this endeavor, the FCC has established "federal primacy over the areas of technical standards and competitive market structure for cellular service." *86*

F.C.C.2d 469 at PP 79, 82.[5] The FCC's technical standards are intended to produce "compatible operation of equipment on both local and national levels," and promote "signal quality and other quality aspects of system performance." *Cellular Communications Systems, 86 F.C.C.2d 469 at P 84.* Thus, regulation of wireless service typically revolves around matters such as the allocation of frequencies, height and power of antenna base stations, and radiation power of mobile units such as wireless phones. *86 F.C.C.2d 469 at PP 87-95.*

To further encourage the rapid deployment of uniform wireless services, Congress began to develop a system of federal telecommunications regulation in the 1993 amendments to the FCA. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-97 (1993) ("OBRA" or the "1993 Amendments"); *In re Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, 10 F.C.C. Rcd. 7025, PP2, 10 (1995), review denied, 78 F.3d 842 (2d Cir. 1996).* First, Congress revised Section 2(b) of the Act to *exclude* wireless services from the prohibition on federal regulation of intrastate communications. *See 47 U.S.C. § 152*(b). Second, Congress amended *47 U.S.C. § 332* to give the FCC exclusive authority over the regulation of the rates charged by and market entry of mobile service providers. OBRA, § 6002(b)(2)(A), 107 Stat. 312, 394 (1993), *codified at 47 U.S.C. § 332*(c)(3)(A). Congress intended these changes to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Rep. No. 111, 103rd Cong., 1st Sess.

---

[5] The FCC continued to recognize a "complementary" role for state certification of carriers. *Cellular Communications Systems, 86 F.C.C.2d 469 at P 83.*

260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587 (Def. Appendix, Tab 2).

In the Telecommunications Act of 1996 ("FTA" or the "1996 Amendments"), Pub. L. No. 104-104, 110 Stat. 56, Congress revisited the FCA by directly prohibiting state and local regulation of "the placement, construction, and modification of personal wireless service facilities" on the basis of concerns about radio frequency radiation. *47 U.S.C. § 332*(c)(7)(B)(iv). As a result,

> Pursuant to Section 332(c)(7), and consistent with the Commission's general authority to regulate the operation of radio facilities, State and local governments are broadly preempted from regulating the operation of personal wireless service facilities based on RF emission considerations. Thus, for example, a local government may not require a facility to comply with RF emissions or exposure limits that are stricter than those set forth in the Commission's rules, and it may not restrict how a facility authorized by the Commission may operate based on RF emissions or any other cause.

In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, Report and Order, 15 FCC Rcd. 22, 821, P 17(2000) (Def. Appendix, Tab 3). According to the relevant Congressional report:

> The Committee finds that the current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit

> the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible.

H.R. Rep. No. 104-204, 104th Cong., 2d Sess. 94 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 61 (Def. Appendix, Tab. 5). To "insure an appropriate balance in policy," *id.*, Congress instructed the FCC to prescribe rules regarding the environmental effects of radio frequency emissions within 180 days of the enactment of the 1996 Amendments. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 704(c).

While the 1996 Amendments were being debated, the FCC was already in the process of determining whether to update its radio frequency radiation regulations.[6] After

---

[6] Although the FCC did not initially consider itself responsible for evaluating and controlling the environmental impact of radiation from wire-line technology and radio communications, the agency adopted guidelines for limiting electromagnetic radiation emissions from televisions, telephones, radios, and various antennae after the passage of the National Environmental Policy Act ("NEPA") of 1969. Pub. L. No. 91-190, 83 State 852 (codified at *42 U.S.C. § 4321, et. seq.* (1994) (requiring federal agencies to examine and address the environmental effects of their policies). From 1985 to 1991, the FCC limited RF emissions from wireless service facilities in accordance with the standards promulgated by the American National Standards Institute ("ANSI"), which is "internationally recognized for [its] expertise in this area." *In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(iv) of the Communications Act of 1934, 12 F.C.C.R. 13, 494,* (August 25, 1997) (the *"FCC Second Order"*) (Def. Appendix, Tab 6). ANSI replaced its standards with a more stringent set in 1992. *In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 8*

notice and an extensive period for the submission of public comment, the FCC issued Release No. 96-326 (the "*FCC First Order*") on August 1, 1996. *See In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Release No. 96-326, 11 F.C.C.R. 15123 (1996)* (Def. Appendix, Tab 8.) Release No. 96-326 articulates a specific absorption rate ("SAR") that wireless phones may not exceed,[7] and currently applies to all wireless phones sold in the United States. *See 47 C.F.R. § § 1.1307, 2.1091, 2.1093.*[8] According to the FCC, the limits set by Release No. 96-326 are "one fiftieth of the point at which RF energy begins to cause any unhealthful thermal effect." *Cellular Phone Taskforce v. FCC,* U.S. Sup. Ct. No. 00-393, Brief for the Respondents in Opposition [to Petition for Writ of Certioriari], p. 3 (Dec. 2000) (hereinafter "*FCC Brief*") (Def. Appendix, Tab 4) (*citing* National Council on Radiation Protection and Measurements, *Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields,* NCRP Report No. 86, at 279-283 (1986)).

F.C.C.R. 2849, P 6 (1993) (Def. Appendix, Tab 7). The FCC issued a public notice that it was considering amending its guidelines to reflect the ANSI changes in 1993. *Id.*

[7] "SAR is a measure of the rate of energy absorption due to exposure to an RF transmitting source." *47 C.F.R. § 2.1093(d).*

[8] One year after these regulations were issued, the FCC amended them in response to petitions for reconsideration. In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, 12 F.C.C.R. 13, 494 (August 25, 1997) (Def. Appendix, Tab 6) (the "FCC Second Order"). These amendments did not, however, alter the mandate of the First Order as it related to wireless phones. In fact, the Second Order specifically affirmed the RF exposure limits articulated by the FCC in the First Order. FCC Second Order, PP 2, 39.

The FCC's RF guidelines have been criticized because of the agency's acknowledged lack of expertise over public health and safety matters. In response, the FCC has stated:

> To be sure, the [FCC] 'does not have the expertise to make independent judgments on such alleged health effects as 'electrosensitivity' or other reported effects on human health. This is the responsibility of the federal health and safety agencies.' *RF Reconsideration Order, 12 F.C.C.R. 13, 494, 13, 538.* As the agency acknowledged when it first implemented RF exposure rules, it lacks expertise to 'develop our own radiation exposure guidelines,' but 'does have the expertise and authority to recognize technically sound standards promulgated by reputable and competent organizations such as *ANSI.' 100 F.C.C.2d at 551.* Moreover, the FCC consulted extensively with EPA, FDA, OSHA and other federal health and safety agencies, all of which concurred in the final standard. *RF Order, 12 F.C.C.R. at 13, 538.* EPA in particular had been working on its own set of RF exposure rules and it had extensive familiarity with the scientific and medical literature. Pet. App. A10. In short, the RF regulations culminated from a multi-disciplinary, multi-agency effort in which the FCC took the lead.

FCC Brief, 21-22 (Def. Appendix, Tab 4) (emphasis in original).[9] The FDA's involvement was particularly

---

[9] With regard to the collaborative process used in adopting the current RF guidelines, the FCC also has stated:

In reaching our decision on the adoption of new RF exposure guidelines we have carefully considered the large number of comments submitted in

important because of its authority over radiation emitting products pursuant to the Electronic Product Radiation Control Act. *See 21 U.S.C. § 360ii.*[10] Under the advisement of the FDA, for example, the FCC declined to adopt the ANSI/ IEEE radiated power exclusion, which would have exempted wireless phones and other low-power devices from having to comply with federal RF safety standards. *FCC*

---

this proceeding, and particularly those submitted by the U.S. Environmental Protection Agency (EPA), the Food and Drug Administration (FDA) and other federal health and safety agencies. The new guidelines we are adopting are based substantially on the recommendations of those agencies, and we believe that these guidelines represent a consensus view of the federal agencies responsible for matters relating to the public safety and health.
FCC First Order, P 2.

[10] The FCC emphasized its deference to other federal health and safety agencies in both the *First* and *Second Orders:*
Although most commenting parties generally support our proposal to adopt the 1992 ANSI/IEEE guidelines, some of the Federal agencies filing comments in this proceeding, principally those with responsibility for oversight regarding health and safety issues, object to the use of certain aspects of these guidelines. In the past, the Commission has stressed repeatedly that it is not a health and safety agency and would defer to the judgment of these expert agencies with respect to determining appropriate levels of safe exposure of RF energy. We continue to believe that we must place special emphasis on the recommendations and comments of Federal health and safety agencies because of their expertise and their responsibilities with regard to health and safety matters.
FCC First Order, P 28.

With regard to DOD's claim that our proposal was not properly coordinated with other agencies, we note that our proposal was coordinated with the federal agencies with health and safety responsibilities. These agencies include the EPA, the FDA, the National Institute for Occupational Safety and Health (NIOSH), and the Occupational Safety and Health Administration (OSHA). Each of these agencies sent letters to the FCC supporting our action.
FCC Second Order, P 37.

First Order, PP 49, 71; *FCC Second Order*, P 30.[11] The FDA has characterized the RF requirements as "a significant step towards achieving a consensus guideline on RF exposure which will have the support of the federal agencies responsible for protecting the public from nonionizing radiation injury." (Letter from Elizabeth D. Jacobson, Ph.D., Deputy Director for Science, FDA Center for Devices and Radiological Health, to Richard M. Smith, Chief of the FCC Office of Engineering and Technology, dated July 17, 1996 (Def. Appendix, Tab 9).)[12] Thus, the national RF requirements represent an inter-agency collaborative federal effort, mandated by Congress and spearheaded by the FCC, to achieve "a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communication

---

[11] The FDA has acknowledged its role in the multi-agency approach to regulating the safety of wireless phones: "The FDA shares regulatory responsibilities for wireless phones with the [FCC]. All phones that are sold in the United States must comply with FCC safety guidelines that limit RF exposure. FCC relies on FDA and other health agencies for safety questions about wireless phones." U.S. Food and Drug Administration, *Consumer Update on Wireless Phones*, July 18, 2001, *available at* www.fda.gov/cdrh/oca/mobilphone.html (Def. Appendix, Tab 11.)

[12] According to the FCC, the EPA also supports this "consensus" view of the RF guidelines.

[The] EPA has recently informed the [FCC] that 'the information base on non-thermal effects has not changed significantly since the EPA's original comments in 1993 and 1996. The majority of currently available studies suggests that there are no significant non-thermal human health hazards. It therefore continues to be EPA's view that the FCC exposure guidelines adequately protect the public from all scientifically established harms that may result from RF energy fields generated by FCC licensees.'

FCC Brief, 23 n. 12 (*quoting* Letter from Robert Brenner, Acting Deputy Asst. Administrator for Air and Radiation, to Dale Hatfield, Chief, FCC Office of Engineering and Technology, dated April 30, 1999) (Def. Appendix, Tab 4.)

services to readily address growing marketplace demands."[13] *FCC Second Order*, P 29.

2. Plaintiffs' Claims

To determine whether plaintiffs' right to relief necessarily depends on a substantial federal question, the court must examine the plaintiffs' complaints. In *Pinney*, plaintiffs acknowledge that defendants are licensed by the FCC to provide wireless phones, and that the phones are manufactured in accordance with these licenses and other information provided by the FCC. (*See Pinney* at PP 50-52). Nonetheless, plaintiffs claim that defendants have (1) failed to warn consumers about adverse health risks associated with RF emissions from wireless phones (*id.*, "COUNT I--

---

[13] Both the FDA and the FCC have publicly reaffirmed their belief that existing scientific data does not indicate that FCC-compliant wireless phones are biologically harmful. *See, e.g.*, U.S. Food and Drug Administration, Center for Devices and Radiological Health, Consumer Update on Mobile Phones (Oct. 20, 1999) (Appendix, Tab 13). The latest FCC consumer information pamphlet states:

Cell Phones and Your Health

...The FCC requires cell phone manufacturers to ensure that their phones comply with [the FCC's] objective limits for safe exposure. Any cell phone at or below these SAR levels (that is, any phone legally sold in the U.S.) is a "safe" phone as measured by these standards...

There is no scientific evidence to date that proves that wireless phone usage can lead to cancer or other adverse health effects, such as headaches, dizziness, elevated blood pressure, or memory loss. However, studies are ongoing, and key government agencies such as the FDA continue to monitor the results of the latest scientific research on this topic. *See* FDA Web site at www.fda.gov/cdrh/phones. Also, the World Health Organization (WHO) has established an ongoing program to monitor research in this area and make recommendations related to the safety of mobile phones. See WHO Web site at www.who.int/peh-emf.

Market Sense. Cell Phones: Facts, Fiction, Frequency, available at http://www.fcc.gov/cib/cell_phones.html (Appendix, Tab 10).

STRICT PRODUCT LIABILITY -- FAILURE TO WARN," PP 88-100); (2) knowingly placed defective and unreasonably dangerous products in the stream of commerce by selling and activating wireless phones without headsets (*see Pinney*, "COUNT II-- STRICT PRODUCT LIABILITY -- DESIGN OR MANUFACTURING DEFECT," PP 101-109); (3) engaged in deceptive acts and practices by "making false and misleading oral and written statements" about the safety of wireless phones in violation of Maryland's Consumer Protection Act, *Md. Com. Law Code Ann. § 13-101, et. seq.* (id., "COUNT III-- VIOLATIONS OF MARYLAND CONSUMER PROTECTION ACT," PP 110-114);[14] (4) breached implied warranties of merchantability by knowingly selling and distributing unreasonably dangerous wireless phones (*id.*, "COUNT IV-- BREACH OF IMPLIED WARRANTIES," PP 115-121); (5) negligently designed, manufactured, tested, marketed, distributed, and/or sold the wireless phones to the public (*id.*, "COUNT V-- NEGLIGENCE," PP 122-133); (6) fraudulently "misinformed, misled, and deceived" consumers into believing in the safety of the wireless phone (*id.*, "COUNT VI-- FRAUD" and "COUNT VII-- FRAUD BY CONCEALMENT," PP 84, 133-149); and (7) conspired to market unsafe wireless phones by improper and wrongful means (*id.*, "COUNT VIII-- CIVIL CONSPIRACY," PP 150-163). In plaintiffs' view, any statements by defendants portraying the phones as "safe" because they comply with FCC standards are fraudulent and deceitful because "the FCC has declared that it does *not* consider itself the 'expert agency' for evaluating the health effects" of radio frequency

---

[14] The *Farina* Complaint alleges violations under Pennsylvania's Unfair Trade Protection and Consumer Protection Law, and the *Gilliam* Complaint alleges violations under New York's Consumer Protection for Deceptive Products Act. The *Gimpelson* and *Naquin* Complaints allege only Georgia and Louisiana common law theories of liability, respectively.

radiation. (*See id. at PP 53, 79.)* To bolster this position, plaintiffs suggest that such safety "advertisements" have been challenged by the FDA. (*Pinney* at P 80 (*citing* Letter from Elizabeth Jacobson, Deputy Director of the Food & Drug Administration's Center for Devices and Radiological Health, dated July 19, 1993).) Plaintiffs further claim that defendants, both individually and collectively, have conspired to exercise improper influence over the American National Standards Institute, the organization responsible for developing the RF safety guidelines upon which the national standards are based. (*Id. at PP 71-75.)* These allegations put the validity of the federal regulations, and the process by which they were developed, directly into dispute.

Although none of these claims explicitly challenge the FCC's radiation exposure guidelines, an examination of the class plaintiffs propose and the remedy plaintiffs request reveals that the true gravamen of these complaints is to attack the lack of a headset requirement under the federal RF safety rules. Plaintiffs seek to represent all present and future cell phone users who have not been diagnosed with the injuries wireless phones supposedly generate.[15] (*Pinney,* "CLASS ACTION ALLEGATIONS," P 42.) The only relief they request is for the court to force defendants to provide

---

[15] Paragraph 42 of the *Pinney* Complaint states:

42. The named Plaintiffs bring this class action on behalf of themselves and all other persons similarly situated for the purpose of asserting the claims alleged on a common basis.
The proposed class is defined as:
(a) All purchasers or lessees of WHHPs ("wireless hand-held phones") who are residents of the State of Maryland, and who were residents of the State of Maryland when they purchased or leased a WHHP, who have not been diagnosed with a brain related tumor or cancer of the eye and who were not furnished a headset at the time they purchased or leased their WHHP; and
(b) All future purchasers of WHHPs who are residents of the State of Maryland and who have not been diagnosed with a brain related tumor or cancer of the eye.

them with headsets, either through compensatory damages or prohibitory injunctions.[16] (*See Pinney*, PP 100 (a)-(h), 109 (a)-(h), 114 (a)-(g), 121 (a)-(g), 133 (a)-(h), 142 (a)-(h), 149 (a)-(h), 163 (a)-(h).) Any court faced with such a class and requested remedy necessarily must evaluate whether the FCC has been authorized by Congress to act as the final authority on the regulation of RF emissions from wireless phones, and whether the current RF requirements promulgated by the FCC adequately protect the public's health. Indeed, the FCC has already considered and rejected a headset requirement.[17] Thus, a state imposed headset rule

---

[16] In the *Pinney* Complaint, the plaintiffs pray for the following relief:
a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff J. Douglas Pinney and for each Class Member;
b. Reimbursing Plaintiff Patricia S. Colonell and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;
c. Providing each Class member who has not been so provided a WHHP that can be used with a headset;
d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;
e. For punitive damages to Plaintiffs and other members of the Class;
f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warning;
g. For costs, attorney fees, and legal pre-judgment interest; and
h. An Order certifying the Class and appointing the Plaintiffs and their counsel to represent the Class.
(*Pinney*, P 100 (a)-(h).)

[17] In response to the question "Do hands-free kits [*i.e.*, headsets] for wireless phones reduce risks from exposure to RF emissions?," the FCC and the FDA state: "Since there are no known risks from exposure to RF emissions from wireless phones, there is no reason to believe that hands-free kits reduce risks. . . . Wireless phones marketed in the U.S. are required to meet safety requirements regardless of whether they are used against the head or against the body. Either configuration should result in compliance with the safety limit." *See* FDA & FCC, *Cell Phone Facts, Consumer Information on Wireless Phones, available at*

necessarily invalidates the national standard. A suit to invalidate a federal regulation as unreasonable arises under federal law. *See Cahnmann v. Sprint Corp., 133 F.3d 484, 488 (7th Cir. 1998)* ("A tariff filed with a federal agency is the equivalent of a federal regulation, and so a suit to enforce it, and even more clearly a suit to invalidate it as unreasonable under federal law . . . arises under federal law.") (citations omitted); *see also Marcus, 138 F.3d at 55-56* (upholding removal of a breach of warranty claim against AT&T under the substantial federal question doctrine because the tariff that the claim was based upon had the force of federal law).

The Second Circuit recently rejected a suit to invalidate the FCC's RF regulations in *Cellular Phone Taskforce v. FCC, 205 F.3d 82 (2d Cir. 2000), cert. denied, 531 U.S. 1070, 148 L. Ed. 2d 661, 121 S. Ct. 758 (2001).* The similarities between *Cellular Phone Taskforce* and the present case cannot be ignored. In *Cellular Phone TaskForce,* two consumer groups challenged the FCC's standards on RF emissions in federal court. These groups contended, as the plaintiffs do here, that the current federal RF regulations do not adequately protect the public from the "non-thermal effects of RF radiation."[18] Instead of

---

http://www.fda.gov/cellphones/qa.html. (*See also* Letter to Court from Def. re: "In re Wireless Telephone Radio Frequency Litigation," dated May 6, 2002, pp. 1-2.)

[18] In the present case, plaintiffs assert that the ANSI standards defendants complied with in manufacturing their phones before 1989 were "based solely on the *thermal* effects associated with RFR and did not contemplate or consider the possibility that RFR exposure could give rise to non-thermal biological injury and subsequent adverse health effects." (*Pinney* Complaint, P 72.) In their Motion to Remand, plaintiffs further declare:

The FCC has set guidelines for the thermal effects of environmental exposure to RF emissions from WHHPs. It does not regulate the non-thermal biological effects of RF radiation upon human brain tissue of the

requesting a headset, however, plaintiffs in *Cellular Phone Taskforce* argued that the FCC should have created greater safety margins to account for scientific uncertainty about RF emissions. *Id. at 90-91.* Characterizing this as "a policy question, not a legal one," *id.*, the Second Circuit remarked:

> The FCC concluded that requiring exposure to be kept as low as reasonably achievable in the face of scientific uncertainty would be inconsistent with its mandate to 'balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible.' This policy conclusion is neither irrational, arbitrary nor capricious and we decline to disturb it.

Id. at 92.

---

immediate user -- the subject of these actions.

(*See* Pl. Mot. to Remand, p. 11 (*citing Cellular Phone Taskforce, 205 F.3d at 90-92).)*

In *Cellular Phone Taskforce*, however, the Second Circuit stated, "In promulgating their standards, both the ANSI and the NCRP considered non-thermal effects." *Cellular Phone Taskforce, 205 F.3d at 90.* Upon review of their conclusions, the court found that "at most, the newly submitted evidence established that the existence of non-thermal effects is 'controversial,' and that room for disagreement exists among experts in the field." *Id.* Concluding that the FCC's reliance on ANSI and NCRP was "reasonable" and "justified," *id. at 90-91*, the Second Circuit upheld the federal regulations. Thus, any assertion that the FCC does not consider the non-thermal effects of radio frequency radiation appears to be incorrect.

Congress's primary goal in regulating wireless service is to develop a seamless and ubiquitous national system of wireless communications.

> The RF exposure rules govern the activities of entities that are licensed and heavily regulated by the FCC. Congress has charged the FCC with 'making available ... a rapid, efficient, Nation-wide, and world-wide wire and radio communications service,' *47 U.S.C. 151* (1994 & Supp. IV 1998), has declared it 'the policy of the United States to encourage the provision of new technologies and services to the public,' *47 U.S.C. 157* (a), and has established procedures to ensure the 'efficient and intensive use of the electromagnetic spectrum,' *47 U.S.C. 309* (j)(3)(D) (Supp. IV 1998). There is a trade-off between those goals and public exposure to RF energy: all risk from RF energy could be eliminated by prohibiting wireless communications technologies. Congress has entrusted to the FCC the process of striking the appropriate balance, a subject squarely within the agency's expertise.

FCC Brief at 21. The current federal requirements reflect carefully considered judgments by Congress, FCC, FDA, EPA, NIOSH, and OSHA about the appropriate method of balancing these concerns. As the Fourth Circuit recognized in *Ormet,* "where the resolution of a federal issue in a state-law cause of action could, because of different approaches and inconsistency, undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest, justifying the exercise of

jurisdiction by federal courts." *Ormet, 98 F.3d at 807* (*citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 347-48, 4 L. Ed. 97 (1816)* (Story, J)).[19] While state courts ultimately

---

[19] Plaintiffs argue that *Ormet* is "neither 'controlling' nor instructive" because it is not a removal case. (*See* Pl. Reply, p. 2). At the same time, however, plaintiffs rely on *Fair v. Sprint Payphone Services, Inc., 148 F. Supp. 2d 622, 626 (D.S.C. 2001),* to support their argument that remand is proper in the present case. In *Fair,* the families of inmates sued the state of South Carolina in state court, alleging that it had violated state law by entering into contracts for inmate payphone services which charged family members uncompetitive rates. *Id. at 624.* Defendants argued that removal was proper because the FCA gives the FCC authority to regulate payphone compensation plans. *Id.* Finding the FCC's actual regulations on payphone compensation plans to be less than comprehensive, the court declined to exercise jurisdiction solely on the basis of an authority to regulate, and remanded the case to state court. *Id. at 625.* On the propriety of remand, therefore, *Fair* is easily distinguishable from the present litigation. In contrast to the FCC's regulation of payphone compensation plans, the FCC has fully and comprehensively regulated radio frequency radiation from telecommunications facilities, as is extensively discussed throughout this memorandum. With regard to plaintiffs' assertion about the applicability of *Ormet,* the court notes that *Fair* took pains to distinguish *Ormet,* explaining that, unlike *Ormet,* the "state court will not need to interpret any core term of section 276 [of the Telecommunications Act] to decide whether the plaintiffs' claims can succeed." *Id. at 626.* Thus, while not a removal case, *Ormet* is relevant to this court's determination of whether to exercise federal jurisdiction based on the substantial federal question doctrine. *See also* WRIGHT, MILLER, & COOPER, *supra,* § 3722 at 384-85 ("It is quite appropriate to construe the provision in the removal statute in a manner that calls for the application of the general principles governing original federal question jurisdiction to the removal of state cases that involve questions of federal law. . . . Generally then, federal removal jurisdiction based on Section 1441(b) embraces the same class of cases as is covered by Section 1331, the original federal question jurisdiction statute."). *Ormet* is therefore both relevant and persuasive authority, as this court must apply the law of the Fourth Circuit in considering cases referred to it by the MDL panel. *See In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 718 n. 15 (D. Md. 2001)* (*citing In re Am. Honda Motor Co. Dealerships Relations Litig., 941 F. Supp. 528, 536-37 (D. Md. 1996)).*

might conclude that they are preempted from regulating the wireless industry on the basis of RF concerns, the risk of fifty different states articulating fifty different rules about whether and to what extent they may set RF safety standards could create market instability and prevent the maintenance of an unimpeded national network of rapid and efficient telecommunications service, a goal of significant importance to national commerce and security. With these federal interests figuring so centrally to plaintiffs' case, removal is fully justified.

Removal might not be warranted if plaintiffs could prevail without a court evaluating the validity and sufficiency of the federal standards. "If a claim is supported not only by a theory establishing federal subject matter jurisdiction but also by an alternative theory which would not establish such jurisdiction, then federal subject matter jurisdiction does not exist." *Mulcahey, 29 F.3d at 153* (*citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 811, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988)); Danfelt v. Bd. of County Commissioners, Washington County, Maryland, 998 F. Supp. 606, 609-10 (D. Md. 1998).* Here, however, the central premise of each count of each complaint is that federal safety regulations governing wireless hand-held phones permit the sale of a product that is unreasonably dangerous to consumers. The only way a court can resolve this dispute and possibly grant plaintiffs the remedy they seek is for it to pass judgment on the validity of the federal RF standards.[20] Defendants have the right to

---

[20] At the hearing held before the court on February 15, 2002, plaintiffs conceded that the only relief they seek is a judicial requirement that defendant cell phone manufacturers must provide headsets with wireless phones. This is illustrated by the following dialogue between the court and plaintiffs' counsel:

Mr. Howell: ... [Defendants] particularly are interested in the injunctive relief that is sought. It may well be that the wide-ranging prohibitory

injunction might run afoul of federal law. That's obviously a defense that has to be honored if there is such a conflict by the state courts that decide the case.

Court: Then what would you have left? I mean assuming that in light of provisions under the Communications Act about entry for wireless service facilities and in light of the fact that it says that you can't, state and local government can't regulate on the basis of environmental effects of radio frequency emission, I mean if you kick out the injunctive relief, what is left in the state court cases?

Mr. Howell: There is a request for compensatory damages. There's --

Court: What sort of compensatory damages? Isn't it compensatory damages to buy headsets?

Mr. Howell: The cost of a headset which is I can say with some certainty is worth $ 19.99 per plaintiff. That is the basic relief. Whether a state court would have to go beyond that relief and say you're enjoined, I think is probably a question that is fairly debatable. Why would a court that orders full relief in the monetary form, you know, why would defendants object to such an award assuming its validity? Why would a defendant again fail to provide headsets? Certainly a state court would be reluctant to enjoin practices that have not yet occurred. You know, it might be some kind of supplemental relief. It could also be narrowly drawn. . . .

Court: The only damages you're telling me about are the cost of headsets --

Mr. Howell: Right.

Court: -- which, to the extent that you're purporting to have a class of people that [is] going to proceed into the future, I mean I don't see exactly how you do that other than in some injunctive form. But isn't it in substance anyway the same thing as injunctive relief? I mean if you're telling the people that sell the wireless phone that they must provide headsets or money to buy them --

Mr. Howell: Yeah. ...

(*See In re Wireless Telephone Radio Frequency Products Liability Litigation*, Civ. No. 01-MD-1421, Transcript of Motion to Remand Before Judge Catherine C. Blake, February 15, 2002, pp. 15-18.)

have such an evaluation take place in federal court. The court will therefore deny plaintiffs' motion to remand.

III. ARTFUL PLEADING

Under the doctrine of "artful pleading," a court is permitted to look behind a complaint to determine whether a plaintiff is attempting to conceal the federal nature of his claim by fraud or obfuscation. *Phillip Morris Inc., 934 F. Supp. at 175.* The application of artful pleading is "most appropriate in cases where federal law altogether preempts and supplants state law, but plaintiff seeks to avoid the effect of preemption by pleading only state causes of action." *See id. at 175 (quoting Cheshire v. Coca-Cola Bottling Affiliated, Inc., 758 F. Supp. 1098, 1100 (D.S.C. 1990)).* In 1998, the Supreme Court stated in *Rivet v. Regions Bank of Louisiana:* "The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim." *522 U.S. 470, 475, 139 L. Ed. 2d 912, 118 S. Ct. 921.*

Since *Rivet,* some courts have concluded that artful pleading cannot exist absent complete preemption. *See Waste Control Specialists, LLC v. Envirocare of Texas, Inc., 199 F.3d 781, 783 (5th Cir. 2000)* ("Without complete preemption, the artful pleading doctrine does not apply."); *Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 311 n.5 (3rd Cir. 1994)* ("[Complete preemption] has been referred to elsewhere as the 'artful pleading' doctrine, under which a court will not allow a plaintiff to deny a defendant a federal forum when the plaintiff's complaint contains a federal claim 'artfully pled' as a state law claim.") (citation omitted). Others, including one court within this circuit, have declined to read into *Rivet* an intention by the Supreme Court to collapse artful pleading and complete preemption into a single rule. *See Reveal v. Stinson, 115 F. Supp. 2d 688, 690 n.2 (S.D.W.Va. 2000).*

Past precedent indicates that artful pleading requires the presence of either complete preemption or "'a state cause of action the merits of which turn on an important federal question.'" *Id. at 690* (citations omitted). As noted in *Reveal,* it would be inappropriate to assume that the Supreme Court in *Rivet* overruled *sub silentio* "a landmark line of cases that have guided the determination of federal jurisdiction for many decades." *Reveal, 115 F. Supp. 2d at 690 n.2; see also* WRIGHT, MILLER, & COOPER, *supra,* § 3722 at 447.

Rather than characterizing artful pleading as a separate "removal doctrine," however, the term may more accurately be used to describe the manner in which some plaintiffs, such as those presently before the court, manage to plead claims that are actually federal (because they are either completely preempted, or based entirely on substantial federal questions) under state law. In such cases, a court need not "blind itself to the real gravamen of [the] claim." *Phillip Morris, 934 F. Supp. at 176 (quoting In re Wiring Device Antitrust Litig., 498 F. Supp. 79, 82 (E.D.N.Y. 1980)).* Plaintiffs' proposed class represents the same interests as the consumer groups in *Cellular Phone Taskforce* -- both sets of plaintiffs are uninjured users of wireless phones seeking stricter limits on radio frequency emissions. Unlike the *Cellular Phone Taskforce* plaintiffs, however, the plaintiffs in this litigation want reconsideration of the federal standards to occur in state court. In other words, rather than directly attack the federal requirements in the appropriate forum, plaintiffs are attempting to circumvent the FCA's comprehensive regulatory scheme by pursuing stricter safety measures, *i.e.,* the addition of headsets, under state tort law.

Ordinarily, as 'masters of the complaint,' plaintiffs may plead their claims within the confines of state law, if they so choose. Recognizing the unlikelihood of success in federal court given the Second Circuit's determination in *Cellular Phone Taskforce,* however, plaintiffs have impermissibly

structured this litigation to avoid the uniform determination of RF safety in a federal forum by simultaneously bringing substantially similar actions in a variety of state courts. Plaintiffs may not deny defendants their right to have decisions concerning RF safety made in a federal forum by labeling their claims exclusively under state law in order to conceal the existence of a substantial federal question. Nor may plaintiffs "deliberately obscure[] the true nature of their claims in an attempt to proceed with their action in state court without the restrictions imposed by the comprehensive regulatory scheme embodied in the Communications Act." *In re Comcast Cellular Telecommunications Litigation, 949 F. Supp. 1193, 1204 (E.D. Pa. 1996)* (permitting removal of disguised rate challenge pursuant to artful pleading doctrine). Thus, plaintiffs' artful pleading further warrants this court's decision to exercise jurisdiction.

IV. COMPLETE PREEMPTION

Plaintiffs next argue that removal is proper on the basis of complete preemption. In considering this argument, the court must distinguish between ordinary conflict preemption and complete preemption. As the Fourth Circuit has explained:

> Under ordinary conflict preemption, state laws that conflict with federal laws are preempted, and preemption is asserted as 'a federal defense to the plaintiff's suit. As a defense it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court.' *Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987).* . . . In the case of complete preemption, however, Congress 'so completely

> pre-empts a particular area that any civil complaint raising this select group of claims is necessarily federal in character.' *Taylor, 481 U.S. at 63-64.* That is to say, the doctrine of complete preemption 'converts an ordinary state common law complaint into one stating a federal claim.' *Id. at 65.* Thus, the doctrine of complete preemption serves as a corollary to the well-pleaded complaint rule: because the state claims in the complaint are converted into federal claims, the federal claims appear on the face of the complaint. *Id. at 63-65.*

Darcangelo v. Verizon Communications, 292 F.3d 181, 2002 WL 1058857, *2 (4th Cir. 2002); *see also Rosciszewski, 1 F.3d at 231; Marcus v. AT&T Corp., 138 F.3d 46, 52-53 (2d Cir. 1998).* In such cases, removal is appropriate under the doctrine of complete preemption.

The complete preemption doctrine has been invoked by the Supreme Court in only three contexts since its inception: claims under the Labor Management Relations Act (LMRA), *29 U.S.C. § 141, et. seq.,* between a labor union and employer under a collective bargaining agreement, *see Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 561-62, 20 L. Ed. 2d 126, 88 S. Ct. 1235 (1968);* certain claims under the Employee Retirement Income Security Act (ERISA), *29 U.S.C. § 1001, et. seq., see Metropolitan Life, 481 U.S. at 65-67;* and claims regarding certain Indian land grant rights, *see Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-67, 39 L. Ed. 2d 73, 94 S. Ct. 772 (1974).* In 1993, the Fourth Circuit concluded that § 301 of the Copyright Act, *17 U.S.C. § 301*(a), also supported complete preemption. *Rosciszewski, 1 F.3d at 232-33.*

Due to its infrequent usage, the precise rules for finding complete preemption are unclear. "The evolution of the doctrine . . . has been one of fits-and-starts and zig-zags and has, not surprisingly, occasioned both confusion and disagreement among the federal circuit and district courts." *Schmeling v. Nordam, 97 F.3d 1336, 1339 (10th Cir. 1996)* (*quoting Burke v. Northwest Airlines, Inc., 819 F. Supp. 1352, 1356 (E.D. Mich. 1993)).* "The inclusion of the term 'preemption' within the doctrine's label, while not inaccurate, has enkindled a substantial amount of confusion between the complete preemption doctrine and the broader and more familiar doctrine of ordinary preemption." *BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc., 182 F.3d 851, 854 (11th Cir. 1999); Johnson v. Baylor Univ., 214 F.3d 630, 632 (5th Cir. 2000).* Complete preemption is not triggered merely because a defendant successfully raises a federal preemption defense. To support an argument for removal based on complete preemption, a defendant must show not only that the plaintiff's claim is preempted under principles of federal law, but also that Congress intended to allow him to litigate the equivalent of his state claim in a federal forum. *BLAB T.V., 182 F.3d at 857.*

The complete preemption doctrine was first applied in *Avco Corp., 390 U.S. at 560-62,* where the Supreme Court determined that an employer's attempt to have union employees enjoined from striking was a suit "arising under the 'laws of the United States' within the meaning of the removal statute," even though the suit was brought in state court and invoked principles of state contract law. Years later, in *Franchise Tax Board,* the Court characterized *Avco* in this manner:

> The necessary ground of decision was that the preemptive force of § 301 [of the LMRA] is so

> powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law.

Franchise Tax Bd., 463 U.S. at 23-24.

The *Franchise Tax Board* Court considered the propriety of removing a state court action filed by a state tax board to enforce levies against an ERISA trust fund. The Court concluded that ERISA preemption did not convert the agency's state claim into a federal one because, unlike § 301 of the LMRA and the plaintiff in *Avco,* ERISA "did not provide an alternative cause of action in favor of the states to enforce its rights." *Franchise Tax Bd., 463 U.S. at 26.* The Court also found it important that, "unlike the contract rights at issue in *Avco,* the State's right to enforce its tax levies is not of central concern to [ERISA]." *Id. at 25-26.*

In *Metropolitan Life, however, the Supreme Court determined that a state court action that was both preempted by and within the scope of § 502(a) of ERISA would be completely preempted under the Avco* rule.[21] *481 U.S. at 64-*

---

[21] Section 502(a)(1)(B) of ERISA provides:
A civil action may be brought--
(1) by a participant or beneficiary--
• • •
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan.

67. The Court came to this conclusion, although reluctantly, for two reasons. First, the jurisdictional grant of § 502(a) was virtually identical to that of the LMRA, which the court had previously found indicative of complete preemption. *Id. at 65-66.* Second, the legislative history of ERISA revealed a clear Congressional intent that suits to enforce benefits under ERISA plans be treated as "arising under the laws of the United States in similar fashion to those brought under section 301 of the [LMRA] of 1947." *Id. (quoting* H.R. Conf. Rep. No. 93-1280, p. 327 (1974)). These factors, taken together, demonstrated Congress's intent to make causes of action within the scope of § 502(a) removable to federal court. *Id.*

Avco, Franchise Tax Board, and *Metropolitan Life* suggest several factors that should be considered in determining whether removal is appropriate based on the doctrine of complete preemption. These include:

> whether the state claim is displaced by federal law under an ordinary preemption analysis, whether the federal statute provides a cause of action, what kind of jurisdictional language exists in the federal statute, and what kind of language is present in the legislative history to evince Congress's intentions.

BLAB T.V., 182 F.3d at 857. In evaluating these factors, a court must keep in mind that the "touchstone" of the inquiry is not the "obviousness" of the preemption defense, but the intent of Congress. *Metropolitan Life, 481 U.S. at 66; Rosciszewski, 1 F.3d at 231-32.*

Defendants articulate two statutory provisions which they believe support complete preemption: *47 U.S.C. § 332*(c)(3), and *47 U.S.C. § 332*(c)(7)(B)(iv).

47 U.S.C. § 332(c)(3)(A) provides:

> No State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(7)(b)(iv) provides:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

Several appellate and district courts already have determined that the provisions of the FCA do not serve as a basis for removal pursuant to the complete preemption doctrine. *Smith v. GTE Corp., 236 F.3d 1292, 1312-13 (11th Cir. 2001)* (the FCA does not provide a basis for removal pursuant to the complete preemption doctrine); *Marcus, 138 F.3d at 53* (same); *Quayle v. MCI WorldCom, Inc., 2001 U.S. Dist. LEXIS 17450,* *5-10 (N.D. Cal. Oct. 22, 2001) (unpubl.) (same); *Braco v. MCI WorldCom Communications, Inc., 138 F. Supp. 2d 1260, 1268-69 (C.D. Cal. 2001)* (same); *Crump v. Worldcom, Inc., 128 F. Supp. 2d 549, 556-60 (W.D. Tenn. 2001)* (the comprehensive nature of the

regulatory scheme created by the FCA does not support complete preemption).

According to defendants, these holdings are of dubious relevance to the present case because they address the propriety of complete preemption in the context of wire-line rather than wireless communications, the latter area being where Congress has expressed a strong national interest in uniformity across state boundaries. Although this distinction could be considered significant, a number of courts have declined to invoke complete preemption in the area of wireless communications as well. *See Shaw v. AT&T Wireless Services, Inc., 2001 U.S. Dist. LEXIS 6589,* *4-14 (N.D. Tex. May 18, 2001) (unpubl.) (§ 332(c)(3) does not support complete preemption); *Bell Atlantic Mobile, Inc. v. Zoning Board of Butler Township, 138 F. Supp. 2d 668, 676-77 (W.D. Pa. 2001)* (§ 332(c)(7) does not support complete preemption); *State of Iowa v. United States Cellular Corp., 2000 U.S. Dist. LEXIS 21656,* at *15-16 (S.D. Iowa 2000) (unpubl.) (§ 332 does not support complete preemption); *Bryceland v. AT&T Corp., 122 F. Supp. 2d 703, 706-10 (N.D. Tex. 2000)* (same); *Aronson v. Sprint Spectrum, L.P., 90 F. Supp. 2d 662, 664-69 (W.D. Pa. 2000)* (same); *Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc., 958 F. Supp. 947, 952-58 (D. Del. 1997)* (same); *but see Bastien v. AT&T Wireless Services, Inc., 205 F.3d 983, 986-90 (7th Cir. 2000)* (§ 332(c)(3)(A) supports complete preemption). These courts have done so primarily because of the absence of indicia that Congress intended any of the provisions of the FCA, including the preemptive provisions of § 332, to permit removal.[22]

---

[22] Another factor federal courts consider in determining whether complete preemption is properly invoked is whether the plaintiff's state claim falls within the civil enforcement provisions of the federal statute. *Franchise Tax Bd., 463 U.S. at 24-26; Aronson, 90 F. Supp. 2d at 665-67.* To this end, defendants invoke *47 U.S.C. § 207* as the FCA provision that provides an enforcement mechanism:

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207. A related provision, *47 U.S.C. § 206,* declares a common carrier liable for damages for violations of the FCA.

To support complete preemption, a statute must create a cause of action that vindicates the same interest as that which the plaintiff's state claim seeks to enforce. *Aronson, 90 F. Supp. 2d at 666 (citing Railway Labor Exec., 858 F.2d at 942).* Defendants proffer *47 U.S.C. § 201* as the federal provision affording plaintiffs the substantive rights they seek. Section 201(b) provides, in pertinent part: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." *47 U.S.C. § 201*(b). Defendants argue that the claim they have negligently and fraudulently provided unsafe products to the public constitutes a type of "unreasonable practice" prohibited by § 201, for which there is a damages remedy under § 207. Defendants concede, however, that the question of whether "practices" may be so broadly construed is one of first impression before this court.

Sections 207 and 206 are most often used with sections 201 or 203 to challenge unreasonable and discriminatory charges by telephone companies for long distance and/or wireless service. *See, e.g., Marcus, 138 F.3d at 54 n.1; Shaw, 2001 U.S. Dist. LEXIS 6589,* *11; *Minnesota v. Worldcom, Inc., 125 F. Supp. 2d 365, 369-70 (D. Minn. 2000); Bryceland, 122 F. Supp. 2d at 707-09; cf. Aronson, 90 F. Supp. 2d at 666-67* (§ 207 provides a cause of action for plaintiffs challenging a service provider's practice of disclosing customer information in violation of *47 U.S.C. § 222).* In contrast, § § 201 and 207 have been held not to provide a cause of action for customers alleging claims of false advertisement, common law fraud, or deceptive business practices by commercial carriers. *Marcus, 138 F.3d at 54; Minnesota v. WorldCom, 125 F. Supp. 2d at 372; Bauchelle v. AT&T Corp., 989 F. Supp. 636, 645-46 (D.N.J. 1997).* Thus, to determine whether the FCA provides a cause of action against these defendants for plaintiffs' claims,

Defendants argue that plaintiffs' claims are completely preempted by § 332 because plaintiffs, by asking state courts to enjoin the provision of cell phones without headsets on the basis of RF emissions, are essentially inviting state courts to regulate entry on the basis of radio frequency concerns, which § § 332(c)(3)(A) and 332(c)(7)(B)(iv) expressly prohibit. Plaintiffs, on the other hand, contend that a state tort headset requirement is not a condition of entry as contemplated by § 332(c)(3), nor is a portable phone a "facility" for purposes of § 332(c)(7). The court does not need to reach these questions because, while § § 332(c)(3) and (c)(7)(B)(iv) undoubtedly are strong express preemption provisions which may be held in state court to bar relief of the sort plaintiffs request[23], neither provision demonstrates removal intent. *Bryceland, 122 F. Supp. 2d at 710; Aronson, 90 F. Supp. 2d at 667-68; Bauchelle, 989 F. Supp. at 646-48.* To the contrary, and unlike the ERISA and the LMRA, the FCA contains a savings clause which provides, "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

---

the court would have to determine whether plaintiffs' products liability claims more closely resemble those for which the FCA provides a cause of action than those for which it does not. The court does not need to resolve this question, however, because even if § § 201 and 207 provide a cause of action encompassing plaintiffs' claims, the FCA does not evidence Congressional intent to permit removal.

[23] Indeed, state courts faced with suits of this nature before the enactment of the 1996 amendments found such claims preempted by other provisions of federal law. *Cf. Schiffner v. Motorola, Inc., 297 Ill. App. 3d 1099, 697 N.E.2d 868, 874, 232 Ill. Dec. 126 (Ill. App. Ct. 1998)* (holding, pre-FTA, that claims that cell phones were unreasonably safe because of RF emissions were preempted by § 360kk(a)(1) of the Electronic Product Radiation Control Act); *Verb v. Motorola, Inc., 220 Ill. Dec. 275, 672 N.E.2d 1287, 1293 (Ill. App. Ct. 1996)* (same).

47 U.S.C. § 414. "The existence of this type of 'savings' clause which 'contemplates the application of state-law and the exercise of state court jurisdiction to some degree . . . counsels against a conclusion that the purpose behind the . . . Act was to replicate the unique preemptive force of the LMRA and ERISA.'" *Smith, 236 F.3d at 1313 (quoting BLAB, 182 F.3d at 857-58); Marcus, 138 F.3d at 54; Bryceland, 122 F. Supp. 2d at 710; Aronson, 90 F. Supp. 2d at 668; Bauchelle, 989 F. Supp. at 648; Weinberg, 165 F.R.D. at 441; see also Geier v. American Honda Motor Company, Inc., 529 U.S. 861, 868, 146 L. Ed. 2d 914, 120 S. Ct. 1913 (2000)* ("[A] savings clause assumes that there are some significant number of common-law liability cases to save."). Moreover, there is nothing in the legislative history or jurisdictional provisions of the FCA to suggest that Congress intended claims preempted by § 332 to "arise under" federal law in the same way as § 502 of ERISA or § 301 of the LMRA. Indeed, although § 332(c)(3) manifests a clear Congressional intent to act preemptively with regard to rates and market entry, the provision, by its own terms, is "narrowly conceived." *Bryceland, 122 F. Supp. 2d at 707 n.3.* By allowing states to regulate "other terms and conditions of commercial mobile services," the language of the provision itself suggests that Congress did not intend for it to support complete preemption. *Id.*

Defendants suggest that a clear indication of removal intent is not required in the Fourth Circuit under *Rosciszewski v. Arete, 1 F.3d 225.* In *Rosciszewski,* the Fourth Circuit extended the complete preemption doctrine to § 301 of the Copyright Act, *17 U.S.C. § 301. Rosciszewski, 1 F.3d at 228.* The plaintiff in *Rosciszewski* brought an action in state court against alleged appropriators of his copyrighted computer program on the grounds that their conduct violated a Virginia statute prohibiting copying by use of computer. *Id.* The defendants removed to federal

court, and the court found the plaintiff's claims completely preempted by § 301. *Id.*

Nothing in *Rosciszewski*, however, is inconsistent with the notion that complete preemption requires removal intent. Indeed, after acknowledging that the doctrine has been sparingly and reluctantly applied, *Rosciszewski, 1 F.3d at 231*, the Fourth Circuit found the requisite intent for two reasons. *Id. at 231-33.* First, the court observed that the legislative history of § 301 indicates that the provision was "'intended to be stated in the clearest and most unequivocal language possible so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively.'" *Id. (quoting* H.R.Rep.No. 1476, 94th Cong. 2d Sess. 1390 (1976)). Moreover, the court emphasized that Congress granted exclusive jurisdiction over copyright matters to federal courts, while permitting concurrent jurisdiction over claims under ERISA and the LMRA. *Id.* In the view of the Fourth Circuit, this jurisdictional grant is "strong evidence that Congress intended copyright litigation to take place in federal courts." *Id. at 232.* Such evidence "compels the conclusion that Congress intended that state-law actions preempted by § 301(a) of the Copyright Act arise under federal law." *Id.*

Although the *Rosciszewski* court looked for and found removal intent, certain aspects of the Copyright Act precluded evaluating Congress's removal intent based on the specific factors found important by the Supreme Court in *Metropolitan Life.* When § 301 of the Copyright Act was enacted, for example, claims within the exclusive jurisdiction of federal courts could not be removed because of the derivative jurisdiction rule. *Rosciszewski, 1 F.3d at 233, n.6* (citations omitted). Since a claim under the Copyright Act would therefore have had to be brought in federal court directly (because federal courts had exclusive jurisdiction over such claims), questions about whether such claims

could be removed were of no import. After Congress abolished the derivative jurisdiction rule in 1987, *id.*, federal courts were able to hear claims removed from state court even if the state court did not itself have jurisdiction. *Id. (citing 28 U.S.C.A. § 1441*(e) (West Supp. 1993)). Because the question of removal was inapplicable at the time of the statute's enactment, however, the fact that removal was not mentioned in the legislative history could not be determinative of Congressional intent. *Id.* (citations omitted). Moreover, because the Copyright Act's exclusive jurisdiction provision was adopted before the Supreme Court's application of the complete preemption doctrine in *Avco* and *Metropolitan Life,* the court declined to "draw a negative inference from the failure of Congress" to make copyright matters removable with the same language used in the jurisdiction provisions of ERISA and the LMRA. *Id.; cf. Metropolitan Life, 481 U.S. at 65-66* (relying on statement in ERISA's legislative history that actions for benefits under ERISA plans are to be regarded as arising under federal law in the same manner as actions under § 301 of the LMRA).

The unique factors present in *Rosciszewski* are not present here. The FCA was amended in 1993 and 1996. During both of these time periods, Congress knew of the Supreme Court's interpretations of sections 301 of the LMRA and 502(a) of ERISA in *Avco* and *Metropolitan Life,* and could have expressly indicated removal intent if it desired to do so. Nothing in the legislative history or jurisdictional language of the FCA amendments expresses removal intent. The only court to have held otherwise is the Seventh Circuit in *Bastien v. AT&T Wireless Servs., Inc., 205 F.3d 983 (7th Cir. 2000).* In *Bastien,* the plaintiff sued AT&T in state court, alleging breach of contract and consumer fraud because he was experiencing a high number of dropped calls. The Seventh Circuit not only determined that Bastien's claims constituted state regulation of entry conditions in violation of § 332(c)(3), but also found §

332(c)(3) sufficient to support removal of the plaintiff's claim under the complete preemption doctrine. *Id. at 987.* The Seventh Circuit did not, however, engage in the analysis used by either the Supreme Court or the Fourth Circuit, as it did not look for removal intent in either the jurisdictional language or legislative history. Accordingly, this court cannot rely on *Bastien* as persuasive authority. The defendants have not established the requisite factors for complete preemption, and this court does not have jurisdiction over plaintiffs' claims by virtue of the complete preemption doctrine.

V. FEDERAL OFFICER PROVISION

Finally, defendants argue that removal is proper under *28 U.S.C. § 1442*(a)(1), which provides that an action may be removed by "any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." In order to satisfy this provision, the defendants must (1) raise a colorable federal defense to the claims asserted against them; (2) show that they were acting under the direction of a federal officer; and (3) demonstrate a causal nexus between plaintiffs' claims and acts they performed under color of federal authority. *Pack v. AC&S, Inc., 838 F. Supp. 1099, 1101 (D. Md. 1993)* (*citing Mesa v. California, 489 U.S. 121, 124-25, 103 L. Ed. 2d 99, 109 S. Ct. 959 (1989)).* Plaintiffs argue that defendants have failed to meet the last two requirements. The court agrees.

Most courts have held that in order for a defendant to be "acting under" a federal officer, the federal officer must have "'direct and detailed control' over the defendant." *Fung v. Abex Corp., 816 F. Supp. 569, 572 (N.D. Cal. 1992)* (*citing Ryan v. Dow Chemical Co., 781 F. Supp. 934, 947 (E.D.N.Y. 1992)).* "This control requirement can be satisfied by strong government intervention and the threat that a defendant will be sued in state court 'based upon actions taken pursuant to

federal direction.'" *Id. (quoting Gulati v. Zuckerman, 723 F. Supp. 353 (E.D. Pa. 1989))*. In *Ryan*, the court explained:

> The rule established is that removal by a "person acting under" a federal officer must be predicated upon a showing that the acts that form the basis for the state civil or criminal suit were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations. . . . By contrast, a person or corporation establishing only that the relevant acts occurred under the general auspices of a federal office or officer is not entitled to section 1442(a)(1) removal. Likewise, the mere fact that a corporation participates in a regulated industry is insufficient to support removal absent a showing that the particular conduct being sued upon is closely linked to detailed and specific regulations.

781 F. Supp. at 947 (citation omitted).

Defendants argue that removal under § 1442(a)(1) is proper because "(1) the claims in these actions are directed at the design and configuration of wireless phones, and (2) the FCC specifically directed defendants to sell or provide only telephones emitting approved levels of RF." (Def. Opp. to Pl. Mot. for Remand, p. 63.) Defendants have not shown, however, that they were "acting under" federal officials with respect to the specific acts for which they are being sued. Plaintiffs' suit is based on defendants' failure to provide headsets with wireless phones. Thus, to support removal defendants must show not only that the phones were built according to FCC specifications, but also that the FCC

restricted or prohibited them from providing additional safeguards, such as headsets, to consumers. *See Ruffin v. Armco Steel Corp., 959 F. Supp. 770, 774 (S.D. Tex. 1997), opinion vacated by Ruffin v. Armco Steel Corp., 1999 WL 318023 (S.D. Tex. 1999)* (because case transferred to Judicial Panel on Multidistrict Litigation); *Arness v. Boeing North American, Inc., 997 F. Supp. 1268, 1275 (C.D. Cal. 1998).* Defendants have failed to show this.[24] Accordingly, removal based on the federal officer provision is improper.

A separate order follows.

6.21.02

Date

Catherine C. Blake

United States District Judge

ORDER

For the reasons stated in the accompanying Memorandum, it is hereby Ordered that:

1. the plaintiffs' consolidated and renewed motion for remand is **DENIED;** and

2. copies of this Order and the accompanying Memorandum shall be sent to counsel of record.

6.21.02

Date

Catherine C. Blake

United States District Judge

---

[24] Indeed, as defendants concede elsewhere in their pleadings, the federal government has given them the option of providing headsets. (Def. Opp., p. 37 n. 16).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. DOUGLAS PINNEY, M.D.; PATRICIA S. COLONELL, individually and on behalf of all others similarly situated; FRANCIS J. FARINA, individually and on behalf of all those similarly situated; GARRETT J. NAQUIN; RONALD LEBLANC; JUDITH A. KAUFMAN; ASHER RUBENSTEIN; CRYSTALL GILLIAM; DIMITRI MACK; RIEDY GIMPELSON, individually and on behalf of all others similarly situated; SARAH DAHLGREN, on behalf of herself and all others similarly situated; LINDA BARRELL; BLAYNE MINOGUE; BRIAN LANE BARRETT; DIANA BARRETT; DAVID C. KELLER; MARSHA L. KELLER

Plaintiffs - Appellants

v.

NOKIA, INCORPORATED, a/k/a Nokia Mobile Phones, Incorporated, a/k/a Nokia Corporation; NEC AMERICA, INCORPORATED; ERICSSON WIRELESS COMMUNICATIONS, INCORPORATED, a/k/a Ericsson, Incorporated; SPRINT PCS LIMITED PARTNERSHIP, a/k/a Sprint PCS, a/k/a Sprint Spectrum, LLP, a/k/a Sprint Spectrum; AUDIOVOX COMMUNICATIONS CORPORATION; NEXTEL COMMUNICATIONS, INCORPORATED, a/k/a Nextel Communications of the Mid-Atlantic, Incorporated, a/k/a Nextel Partners, Incorporated, a/k/a Nextel; MATSUSHITA CORPORATION OF AMERICA, a/k/a Panasonic Corporation; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION; QUALCOMM INCORPORATED; SAMSUNG ELECTRONICS

AMERICA, INCORPORATED, a/k/a Samsung Electronics; SANYO NORTH AMERICA, INCORPORATED, a/k/a Sanyo Business Systems Corporation, a/k/a Sanyo North America Group; SONY ELECTRONICS, INCORPORATED; AT&T CORPORATION, a/k/a AT&T; VERIZON MARYLAND, INCORPORATED, a/k/a Verizon, a/k/a Verizon Wireless, formerly known as Bell Atlantic Maryland, Incorporated; VERIZON COMMUNICATIONS, INCORPORATED, formerly known as Bell Atlantic Corporation; VERIZON WIRELESS, a/k/a Nynex, a/k/a Bell Atlantic Nynex, a/k/a Bell Atlantic Mobile, Incorporated, a/k/a Bell Atlantic NYNEX Mobile; CELLCO PARTNERSHIP, d/b/a Verizon Wireless, formerly known as Bell Atlantic NYNEX Mobile, formerly known as Bell Atlantic Mobile; CINGULAR WIRELESS, LLC, formerly known as BellSouth Mobility, Incorporated, a/k/a Southwestern Bell Wireless, formerly known as Southwestern Bell Mobile Systems, Incorporated; CINGULAR WIRELESS, a/k/a Washington/Baltimore Cellular Limited Partnership; SBC COMMUNICATIONS, INCORPORATED; CELLULAR ONE GROUP, a/k/a Cellular One; VOICESTREAM WIRELESS CORPORATION; C.E.I., INCORPORATED, a/k/a Communications Electronics, a/k/a Communications Electronics, Incorporated; BALTIMORE BUSINESS COMMUNICATIONS, INCORPORATED; COMCAST/METROPHONE; RADIOFONE; POWERTEL, INCORPORATED; POWERTEL PCS, INCORPORATED; POWERTEL/ATLANTA, INCORPORATED; MITSUBISHI WIRELESS COMMUNICATIONS, INCORPORATED; MOTOROLA, INCORPORATED, a Delaware corporation; CELLULAR TELECOMMUNICATIONS AND INTERNET ASSOCIATION, a District of Columbia corporation; CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION; TELECOMMUNICATIONS INDUSTRY

ASSOCIATION, a/k/a TIA; NEXTEL PARTNERS OPERATING CORPORATION

Defendants - Appellees

and

WESTINGHOUSE COMMUNICATIONS; SOUTHERN TELECOM, INCORPORATED, a/k/a Southern LINC; JOHN DOES 1-100; LGIC CORPORATION; PANASONIC CORPORATION; SANSUNG SDI COMPANY; SANYO CORPORATION; SONY CORPORATION; PLANET CELLULAR COMMUNICATIONS, INCORPORATED; VISITOR CELLULAR L.L.C.; BELL SOUTH MOBILITY; KYOCERA WIRELESS CORPORATION; MCI WORLDCOM COMMUNICATIONS, INCORPORATED; U.S. WEST WIRELESS, L.L.C., A Colorado corporation; U. S. WEST COMMUNICATIONS, INCORPORATED, a Colorado corporation; GTE MOBILNET OF SAN DIEGO, INCORPORATED, a Delaware corporation; GTE WIRELESS SAN DIEGO, LLC, a California Limited Liability; CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA, a California corporation; AB CELLULAR HOLDINGS, LLC, d/b/a LA Cellular, d/b/a Los Angeles Cellular Telephone Company

Defendants

FILED April 12, 2005

No. 03-1433
CA-01-3899-CCB
CA-01-3261-CCB
CA-01-3260-CCB
CA-01-3259-CCB
CA-01-1456-CCB
CA-01-1421-CCB

On Petition for Rehearing and Rehearing En Banc

The Appellees' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Luttig, Judge Michael, and Judge Kiser.

For the Court
/s/ Patricia S. Connor
CLERK

APPENDIX D

CIRCUIT COURT FOR BALTIMORE CITY

Civil Action No: 24-C-01-001897

J. DOUGLAS PINNEY, M.D.,
2020 Skyline Road
Towson, Maryland 21204
and
PATRICIA S. COLONELL,
411 Ravenhurst Circle
Glen Arm, Maryland 21057

Plaintiffs individually and on behalf of all others similarly situated,

v.

NOKIA, Inc.
A/K/A Nokia Mobile Phones, Inc.
6000 Connection Drive
Irving, Texas 75039
SERVE ON: Resident Agent
National Registered Agents, Inc.
11 Ease Chase Street
Baltimore, MD 21202
and
Westinghouse Communications
32 South Street
Baltimore, Maryland 21202

NEC AMERICA, INC. ("NEC")
8 Old Sod Farm Road
Melville, New York 11747
SERVE ON: Resident Agent
CSC-Lawyers Incorporating Service
11 East Chase Street
Baltimore, MD 21202

and

ERICSSON WIRELESS COMMUNICATIONS, INC.
A/K/A Ericsson, Inc.
740 East Campbell Road
Richardson, Texas 75081
SERVE ON: Resident Agent
National Registered Agents, Inc.
11 East Chase Street
Baltimore, MD 21202

and

MOTOROLA, INC.
5725 E. River Road
Chicago, Illinois 60631
SERVE ON: Resident Agent
The Corporation Trust
300 East Lombard Street
Baltimore, MD 21202

and

SPRINT PCS LIMITED PARTNERSHIP
A/K/A Sprint Spectrum
A/K/A Sprint
formerly known as,
Bell Atlantic-Maryland, Inc.
4900 Main Street, 12th Floor
Kansas City, Missouri 64112
SERVE ON: Resident Agent
Prentice-Hall Corporation System
11 East Chase Street
Baltimore, Maryland 21202

and

AUDIOVOX COMMUNICATIONS CORPORATION
A/K/A Audiovox Corporation.
150 Marcus Blvd
Hauppauge, New York 11788
SERVE ON: Resident Agent
United Corporate Services, Inc.
20 South Charles Street, Ste. 1200
Baltimore, Maryland 21201

and

NEXTEL COMMUNICATIONS, INC.
A/K/A Nextel,
A/K/A Nextel Communications of the Mid-Atlantic, Inc.
A/K/A Nextel Partners, Inc.
2001 Edmund Halley Drive
Reston, Virginia 20191
SERVE ON: Resident Agent
CSC-Lawyers Incorporating Service Company
11 East Chase Street
Baltimore, MD 21202

and

MATSUSHITA CORPORATION OF AMERICA
A/K/A Panasonic Corporation
9401 West Grand Avenue
Franklin Park, Illinois 60131
SERVE ON: Resident Agent
The Corporation Trust
300 East Lombard Street
Baltimore, Maryland 21202

and

PHILIPS ELECTRONIC NORTH AMERICA CORPORATION
100 East 42nd Street
New York, New York 10017
SERVE ON: Resident Agent
The Corporation Trust
300 East Lombard Street
Baltimore, Maryland 21202

and

QUALCOMM INCORPORATED
A/K/A Qualcomm, Inc.
6455 Lusk Boulevard
San Diego, California 92121
SERVE ON: Resident Agent
CSC-Lawyers Incorporating Service Company
11 East Chase Street
Baltimore, Maryland 21202

and

SAMSUNG ELECTRONICS AMERICA, INC.
A/K/A Samsung Electronics
105 Challenger Road
Ridgefield Park, NJ 07660
SERVE ON: Hank Byun
105 Challenger Road
Ridgefield Park, New Jersey 07660

and

SANYO NORTH AMERICA, INC.
A/K/A Sanyo North America Group.
218 State Route 17 North
Rochelle Park, New Jersey 07662
SERVE ON: John Snyder, President
218 State Route 17 North
Rochelle Park, New Jersey 07662

and

SONY ELECTRONICS, INC.
The Corporation Trust Incorporated
300 East Lombard Street
Baltimore, Maryland 21202
SERVE ON: Resident Agent
The Corporation Trust
300 East Lombard Street
Baltimore, Maryland 21202

and

AT&T CORP.
A/K/A AT&T
195 Broadway
New York, New York
SERVE ON: Resident Agent
Corporation Trust Incorporated
300 East Lombard Street
Baltimore, Maryland 21202

and

VERIZON MARYLAND INC.
A/K/A Verizon Wireless,
A/K/A Verizon,
formerly known as, Bell Atlantic-Maryland, Inc.

1 East Pratt Street, Constellation Plaza
Baltimore, Maryland 21202.
SERVE ON: Resident Agent
Robert D. Lynd
1 East Pratt Street
Constellation Place
Baltimore, Maryland 21202

and

VERIZON COMMUNICATIONS INC.
formerly known as Bell Atlantic Corporation
1 East Pratt Street, Constellation Plaza
Baltimore, Maryland 21202
SERVE ON: Resident Agent
The Corporation Trust
300 E. Lombard Street
Baltimore, Maryland 21202

and

VERIZON WIRELESS
A/K/A Bell Atlantic Nynex
A/K/A Nynex, A/K/A Bell Atlantic Mobile, Inc.
formerly known as Bell Atlantic Nynex Mobile, Inc.
180 Washington Valley Road
Bedminster, New Jersey 07921
SERVE ON: Resident Agent
The Corporation Trust
300 East Lombard Street
Baltimore, Maryland 21202

and

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS
formerly d/b/a Bell Atlantic Mobile,
formerly d/b/a Bell Atlantic NYNEX Mobile
180 Washington Valley Road
Bedminster, New Jersey 07921
SERVE ON: Dennis F. Strigl, President
180 Washington Valley Road
Bedminster, New Jersey 07921

and

CINGULAR WIRELESS LLC
formerly known as Southwestern Bell Mobile Systems, Inc.
2711 Centerville Road, Suite 400
Wilmington, Delaware 19808
SERVE ON: Resident Agent
CSC-Lawyers Service
Incorporating Service Company
11 East Chase Street
Baltimore, MD 21202

and

CINGULAR WIRELESS
A/K/A Washington/Baltimore Cellular Limited PA
7855 Walker Drive, Suite 100
Greenbelt, Maryland 20770
SERVE ON: Resident Agent
The Corporation Trust
300 East Lombard Street
Baltimore, Maryland 21202

and

SBC COMMUNICATIONS INC.
175 East Houston Street
San Antonio, Texas 78205
SERVE ON: Resident Agent
C.T. Corporation Systems
350 North Saint Paul Street
Dallas, Texas 75201

and

CELLULAR ONE GROUP
A/K/A Cellular One
5001 Lyndon B. Johnson Freeway, Ste. 700
Dallas, Texas 75244
SERVE ON: Richard J. Lyons, President
5001 Lyndon B. Johnson Freeway
Ste. 700
Dallas, Texas 75244

and

VOICESTREAM WIRELESS CORPORATION
A/K/A VoiceStream Wireless
3650 131st Avenue SE

Suite 200
Bellevue, Washington 98006
SERVE ON: Resident Agent
CSC-Lawyers Service
Incorporation Service Company
11 East Chase Street
Baltimore, MD 21202

and

C.E.I., INC.
A/K/A Communications Electronics, Inc.
A/K/A Communications Electronics
9494 Deerco Road
Timmonium, Maryland 21093
SERVE ON: Resident Agent
Bryan Cowling
1133 Bentalou Street
Baltimore, MD 21216

and

BALTIMORE BUSINESS COMMUNICATIONS, INC.
2111 Greenspring Ave.
Timmonium, Maryland 21093
SERVE ON: Resident Agent
John A. Armstrong, Jr.
12 Galloway Avenue, Ste. 3A
Hunt Valley, MD 21030

Defendants

COMPLAINT

NOW COME J. Douglas Pinney and Patricia S. Colonell, through the Law Offices of Peter G. Angelos P.C., and their undersigned counsel of record, on behalf of themselves and all other persons similarly situated, pursuant to Maryland Rule 2-231, who hereby aver as follows:

I. NATURE OF THE CASE

1. Through a course of conduct, the Defendants have manufactured, supplied, promoted, sold, leased and provided service for wireless handheld telephones (WHHP) when they knew or should have known that their products generate and emit radio frequency radiation ("RFR") that causes an adverse cellular reaction and/or cellular dysfunction ("biological injury") through its adverse health effect on: calcium and ion distribution across the cell membrane, melatonin production, neurological function, DNA (single and double strand breaks and chromosome damage), enzyme activities, cell stress and gene transcription, and the permeability of the blood brain barrier (collectively hereinafter sometimes described as "the health risk" and/or "the biological effects").

2. Through a course of conduct the Defendants, acting individually and collectively, failed to adequately disclose to the consuming public the fact that WHHPs emit RFR that causes biological injury creating a risk to the user's health.

3. WHHPs are sold in the United States and throughout the world. More than 100 million Americans use WHHPs and over 400 million have been sold throughout the world.

4. This action is brought for monetary damages, declaratory and/or equitable relief.

5. The purpose of this action is to hold accountable and to obtain maximum legal and equitable relief from those corporations and entities that are responsible for producing and placing into the stream of commerce WHHPs, which create a health risk to users by causing biological injury.

6. WHHPs are wireless communication devices which transmit a wireless signal from the antenna of the WHHP to the antenna at a cell tower or from the antenna at a

cell tower to the antenna on the WHHP depending upon whether the WHHP user is making a telephone call or receiving a telephone call.

7. WHHPs are powered by a battery which creates the radio frequency radio waves.

8. The waves referred to in paragraph 6 travel from the antenna on the WHHP to a cell tower or from the cell tower to the antenna on the WHHP.

9. RFR is emitted from the antenna and penetrates the user's human tissue.

10. Research and peer reviewed literature has demonstrated that RFR from WHHPs causes certain types of biological injury which, in turn, creates risk to the users' health.

II. JURISDICTION AND VENUE

11. The Court has jurisdiction over this action pursuant to Annotated Code of Maryland (1995 Replacement Volume), Courts and Judicial Proceedings §§ 6-102 and 6-103. Plaintiff purchased their WHHPs in Maryland and was thereby damaged as set forth herein. The Defendants are all doing business in Maryland, received substantial compensation and profits from the promotion of, sale of, lease of and/or provision of service for WHHPs in Maryland and have made material omissions and misrepresentations in Maryland. At all times relevant herein, acts and conduct in furtherance of the conspiracy, which is the hub of the wrongful conduct alleged herein, occurred in Maryland.

Venue in this case is founded on Annotated Code of Maryland (1995 Replacement Volume), Courts and Judicial Proceedings §§ 6-201(b); 6-202(3); 6-202(8); and 6202(11).

III. PARTIES

A. PLAINTIFFS AND PROPOSED CLASS REPRESENTATIVE.

12. Plaintiff J. Douglas Pinney, M.D. is an adult individual who resides at 2020 Skyline Road, Towson, Maryland 21204. In 2000 Plaintiff purchased from defendant AT&T a WHHP which was sold without a headset. The WHHP was manufactured by defendant Motorola. Incident to and as a result of this purchase, Plaintiff was provided service by defendant Verizon Wireless. Plaintiff has since purchased a headset.

13. Plaintiff Patricia S. Colonell is an adult individual who resides at 4111 Ravenhurst Circle, Glen Arm, and Maryland 21057. Plaintiff purchased, on separate occasions, two WHHPs. Both were sold without headsets. One of the WHHPs purchased by Plaintiff was manufactured by defendant Motorola. Plaintiff purchased her WHHPs from defendants C.E.I. and Baltimore Business Communications. Plaintiff's service for her WHHPs is provided by Verizon formerly known as Bell Atlantic Mobile.

B. DEFENDANTS

14. At all times relevant to this Complaint, the Defendant NOKIA, Inc. a/k/a Nokia Mobile Phones, Inc. ("Nokia") is a Delaware corporation, and was authorized to do business under the laws of the State of Maryland, with its principal place of business at 6000 Connection Drive, Irving, Texas 75039. At all times relevant herein, NOKIA, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacted business in Baltimore City, Maryland and elsewhere in this State, as well as nationally and internationally.

15. At all times relevant to this Complaint, the Defendant WESTINGHOUSE COMMUNICATIONS ("Westinghouse") which is owned by RSL COM U.S.A., Inc. is an unincorporated entity legally active and present in Maryland with its address at Westinghouse Communications Corporation Trust Incorporated, 32 South Street, Baltimore, Maryland 21202. At all times relevant herein, WESTINGHOUSE, through its agents, distributors, servants and/or employees engaged in the provision of voice services for WHHPs.

16. At all times relevant to this Complaint, the Defendant NEC AMERICA, INC. ("NEC") is a corporation organized and existing under the laws of the State of New York, and was authorized to do business under the laws of the State of Maryland, with its principal place of business at 8 Old Sod Farm Road, Melville, New York 11747. At all times relevant herein, NEC, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacted business in Baltimore City, Maryland and elsewhere in this State, as well as nationally and internationally.

17. At all times relevant to this Complaint, the Defendant Ericsson Wireless Communications, Inc. A/K/A Ericsson, Inc. ("ERICSSON") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Maryland, with its principal place of business at 740 East Campbell Road, Richardson, Texas 75081. At all times relevant herein, Ericsson, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacted business in Baltimore City, Maryland and elsewhere in this State, as well as nationally and internationally.

18. At all times relevant to this Complaint, the Defendant, Motorola, Inc. (hereinafter referred to as "MOTOROLA") is a corporation organized and existing

under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Maryland, having its principal place of business at 5725 E. River Road, Chicago, Illinois 60631. At all times relevant herein, Motorola, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business in Baltimore City, Maryland and elsewhere is this State, as well as nationally and internationally.

19. At all times relevant to this Complaint, the Defendant, Sprint PCS Limited Partnership, A/K/A Sprint Spectrum, A/K/A Sprint, formerly known as, Bell Atlantic-Maryland, Inc. (hereinafter referred to as "SPRINT") is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 4900 Main Street, 12th Floor, Kansas City, Missouri 64112. At all times relevant herein, Sprint, through its agents, distributors, servants and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Baltimore City, Maryland and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas.

20. At all times relevant to this Complaint, the Defendant, Audiovox Communications Corporation A/K/A Audiovox Corporation (hereinafter referred to as "AUDIOVOX") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Maryland, having its principal place of business in the State of New York at 150 Marcus Blvd., Hauppauge, New York 11788. At all times relevant herein, Audiovox, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business in Baltimore City, Maryland and elsewhere in this State, as well as nationally and internationally.

21. At all times relevant to this Complaint, the Defendant, Nextel Communications, Inc., A/K/A Nextel, A/K/A Nextel Communications of the Mid-Atlantic, Inc., A/K/A Nextel Partners, Inc. (hereinafter referred to as "NEXTEL") is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 2001 Edmund Halley Drive, Reston, Virginia 20191. At all times relevant herein, Nextel, through its agents, distributors, servants and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Baltimore City, Maryland and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas.

22. At all times relevant to this Complaint, the Defendant, Matsushita Corporation of America A/K/A Panasonic Corporation (hereinafter referred to as "PANASONIC") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Maryland, having its principal place of business at 9401 West Grand Avenue, Frankin Park, Illinois 60131. At all times relevant herein, Panasonic, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business in Baltimore City, Maryland and elsewhere in this State, as well as nationally and internationally.

23. At all times relevant to this Complaint; the Defendant, Philips Electronic North America Corporation (hereinafter referred to as "PHILIPS") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Maryland, having its principal place of business at 100 East 42nd Street, New York, New York 10017. At all times relevant herein, Philips, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and

transacting business in Baltimore City, Maryland and elsewhere in this State, as well as nationally and internationally.

24. At all times relevant to this Complaint, the Defendant, Qualcomm Incorporated A/K/A Qualcomm, Inc. (hereinafter referred to as "QUALCOMM") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Maryland, having its principal place of business at 6455 Lusk Boulevard, San Diego, California 92121. At all times relevant herein, Qualcomm, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs and WHHP services. At all times relevant herein, Qualcomm was transacting business in Baltimore City, Maryland and elsewhere in this State, as well as nationally and internationally.

25. At all times relevant to this Complaint, the Defendant, Samsung Electronics America, Inc. A/K/A Samsung Electronics (hereinafter referred to as "SAMSUNG") is a corporation having its principal place of business at 105 Challenger Road, Ridgefield Park, NJ 07660. At all times relevant herein, Samsung, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and was transacted business in Baltimore City, Maryland and elsewhere in this State, as well as nationally and internationally.

26. At all times relevant to this Complaint, the Defendant, Sanyo North America, Inc. A/K/A Sanyo North America Group (hereinafter referred to as "SANYO") is a corporation having its principal place of business at 218 State Route 17 North, Rochelle Park, New Jersey 07662. At all times relevant herein, Sanyo, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and

transacting business in Baltimore City, Maryland and elsewhere in this State, as well as nationally and internationally.

27. At all times relevant to this Complaint, the Defendant, Sony Electronics, Inc. (hereinafter referred to as "SONY") is a corporation organized and existing under the laws of the State of Delawar^, and was authorized to do business under the Laws of the State of Maryland, having its principal place of business at The Corporation Trust Incorporated, 300 East Lombard Street, Baltimore, Maryland 21202. At all times relevant herein, Sony, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business in Baltimore City, Maryland and elsewhere in this State, as well as nationally and internationally.

28. At all times relevant to this Complaint, the Defendant, AT&T Corp., A/K/A AT&T, (hereinafter referred to as "AT&T") is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 195 Broadway, New York, New York. At all times relevant herein, AT&T, through its agents, distributors, servants and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Baltimore City, Maryland and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas.

29. At all times relevant to this Complaint, the Defendant, Verizon Maryland Inc., A/K/A Verizon Wireless, A/K/A Verizon, formerly known as, Bell Atlantic-Maryland, Inc. (hereinafter referred to as "VERIZON') is a corporation organized and existing under the laws of the State of Maryland, having its principal place of business at 1 East Pratt Street, Constellation Plaza, Baltimore, Maryland 21202. At all times relevant herein, Verizon, through its agents, distributors, servants and/or employees engaged in

the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Baltimore City, Maryland and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas.

30. At all times relevant to this Complaint, the Defendant, Verizon Communications, Inc. formerly known as Bell Atlantic Corporation, (hereinafter referred to as "VERIZON COMMUNICATIONS") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the taws of the State of Maryland, having its principal place of business at 1 East Pratt Street, Constellation Plaza, Baltimore, Maryland 21202. At all times relevant herein, Verizon Communications, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Baltimore City, Maryland and elsewhere in this State, as well as, to cellular . telephone owners and users throughout its service areas.

31. At all times relevant to this Complaint, the Defendant, Verizon Wireless, A/K/A Bell Atlantic Nynex, A/K/A Nynex, A/K/A Bell Atlantic Mobile, Inc., formerly known as Bell Atlantic Nynex Mobile, Inc, (hereinafter referred to as "VERIZON WIRELESS") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Maryland, having its principal place of business at 180 Washington Valley Road, Bedminster, New Jersey 07921. At all times relevant herein, Bell Atlantic Mobile, through its affiliate corporations, companies, and partnerships, agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission, services in Baltimore City, Maryland and elsewhere in this State, as well as, to cellular. telephone owners end users throughout its service areas.

32. At all times relevant to this Complaint, the Defendant, Cellco Partnership, d/b/a Verizon Wireless, formerly d/b/a Bell Atlantic Mobile, formerly d/b/a Bell Atlantic NYNEX Mobile (hereinafter referred to as "CELLCO"), is a partnership organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Maryland, having its principal place of business at 180 Washington Valley Road, Bedminster, New Jersey, 07921. At all times relevant herein, Cellco, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Baltimore City, Maryland and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas.

33. At all times relevant to this Complaint, the Defendant, Cingular Wireless LLC formerly known as Southwestern Bell Mobile Systems, Inc. A/K/A Southwestern Bell Wireless (hereinafter referred to as "CINGULAR WIRELESS"), is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Maryland, having its principal place of business at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. At all times relevant herein, Cingular Wireless, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Baltimore City, Maryland and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas.

34. At all times relevant to this Complaint, the Defendant, Cingular Wireless A/K/A Washington/Baltimore Cellular Limited PA, (hereinafter referred to as "CINGULAR"), is a limited partnership organized and existing under the laws of the State of Virginia, and was authorized to do business under the laws of the State of

Maryland, having its principal place of business at 7855 Walker Drive, Suite 100, Greenbelt, Maryland 20770. At all times relevant herein, Cingular, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Baltimore City, Maryland and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas.

35. At all times relevant to this Complaint, the Defendant, SBC Communications Inc. (hereinafter referred to as "SBC"), is a corporation and existing under the laws of the State of Delaware, having its principal place of business at 175 East Houston Street, San Antonio, Texas 78205, and SBC was conducting its business at all times relevant herein through its affiliate corporations, companies, and partnerships, and its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Baltimore City, Maryland and elsewhere in this State.

36. At all times relevant to this Complaint, the Defendant, Cellular One Group, A/K/A Cellular One (hereinafter referred to as "CELLULAR ONE GROUP"), is a partnership organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Maryland, having its principal place of business at 5001 Lyndon B. Johnson Freeway, Ste 700, Dallas, Texas 75244. At all times relevant herein, Cellular One Group, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Baltimore City, Maryland and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas.

37. At all times relevant to this Complaint, the Defendant, VoiceStream Wireless Corporation, A/K/A VoiceStream Wireless (hereinafter referred to as

"VOICESTREAM"), is a partnership organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Maryland, having its principal place of business at 3650 131st Avenue SE, Suite 200, Bellvue, Washington, 98006. At all times relevant herein, VoiceStream, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Baltimore City, Maryland and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas.

38. At all times relevant to this Complaint, the Defendant, C.E.I., Inc., A/K/A Communications Electronics, Inc. A/K/A Communications Electronics (hereinafter referred to as "CEI"), is a corporation organized and existing under the laws of the State of Maryland, and has its principal place of business at 9494 Deerco Road, Timmonium, Maryland 21093. At all times relevant herein, CEI, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services throughout the State of Maryland.

39. At all times relevant to this Complaint, the Defendant, Baltimore Business Communications, Inc. (hereinafter referred to as "Baltimore Communications"), is a corporation organized and existing under the laws of the State of Maryland, and has its principal place of business at 2111 Greenspring Ave., Timmonium, Maryland 21093. At all times relevant herein, Baltimore Communications, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services throughout the State of Maryland.

40. Defendants John Does 1 through 50 are as yet unnamed defendants who at all times relevant hereto through their agents, distributors, servants and/or employees were

engaged in the design, manufacture, marketing and sale of WHHPs, and transacted business in Baltimore City, Maryland and elsewhere in this State, as well as nationally and internationally.

41. Defendants John Does 51 through 100 are as yet unnamed defendants who at all times relevant hereto through their agents, servants, distributors, and/or employees were engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Baltimore City, Maryland and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas.

IV. CLASS ACTION ALLEGATIONS

42. The named Plaintiffs bring this class action on behalf of themselves and all other persons similarly situated for the purpose of asserting the claims alleged on a common basis.

The proposed class is defined as:

a. All purchasers or lessees of WHHPs who are residents of the State of Maryland, and who were residents of the State of Maryland when they purchased or leased a WHHP, who have not been diagnosed with a brain related tumor or cancer of the eye and who were not furnished a headset at the time they purchased or leased their WHHP; and

b. All future purchasers of WHHPs who are residents of the State of Maryland and who

have not been diagnosed with a brain related tumor or cancer of the eye.

43. Collectively, all of the above shall be referred to as the "Class."

44. **Numerosity of the class. Maryland Rule 2-231(a)(1)**. The Plaintiffs are unable to state with precision the exact size of the class noted above but believe that it is so numerous that individual joinder of all of its members is impracticable.

45. **Existence and predominance of common questions of law and fact. Maryland Rule 2-231(a)(2) and 2-231(b)(3)-(4)**. Common questions of law and fact exist as to all members of the Class. The common questions predominate over any questions affecting only individual members of the Class. These common legal and factual questions include, but are not limited to, the following:

a. whether, during any period, the Defendants, acting individually or collectively, failed to conduct appropriate, reasonable and adequate testing of WHHPs to determine the association between RFR and biological effects and the risk to human health arising therefrom;

b. whether, during any period, the Defendants acting individually or collectively, failed to conduct appropriate, reasonable and adequate research to determine the association between RFR and harmful biological effects.

c. whether, during any period, the Defendants acting individually or collectively, failed to warn or otherwise inform the Plaintiffs and others similarly situated of the association between RFR and biological effects and the risks to human health arising therefrom.

d. whether, during any period, the Defendants acting individually or collectively, failed to provide headsets which would have eliminated, reduced or minimized the biological effects from RFR and its risk to human health arising therefrom.

46. **Typicality of claims and Adequacy of Representation. Maryland Rule 2-231(a)(3)-(4).** Plaintiffs are adequate representatives of the class and their interests do not conflict, but are identical with the interests of the members of the Class they seek to represent. The claims being asserted by Plaintiffs are typical of those of the Class. They have retained counsel competent and experienced in the prosecution of complex civil actions in the areas of tobacco and asbestos litigation, and they intend to prosecute this action vigorously for the benefit of the Class. The interests of the members of the Class will be fairly and adequately protected by Plaintiffs and their counsel.

47. **Superiority. Maryland Rule 2-231(b)(3).** A class action is superior to other available methods for the fair and efficient adjudication of this litigation. Individual litigation is both impracticable and unnecessary under the model proposed herein. Class members are all identically united in the risk of injury to which they are exposed. No

individual issues of injury exist, let alone predominate in this case, because membership in the Class is premised only upon purchase or lease of a WHHP without a headset. In all respects, individual litigation would identically mirror the class action litigation. Individual litigation would be unduly burdensome to the courts and to the claimants. Individual litigation further presents a potential for inconsistent or contradictory judgments and would increase delay and expense to all parties in the court system in resolving the complex issue of the case. This delay and expense would be particularly inefficient in this case, where the risk of injury to which claimants are exposed is identical. The class action device proposed herein provides the benefits of a single adjudication, economics of scale and comprehensive supervision by a single court of thousands of claims which are identical in all respects. In every respect, class action is the best method for the fair and efficient adjudication of this litigation. Notice of the pendency and of any resolution of this class action can be provided to members of the Class by publication and use of the broadcast media.

V. FACTS COMMON TO ALL COUNTS

48. Service providers are an integral component of the WHHP industry, without which WHHPs could not be used.

49. Defendants Verizon, Westinghouse, Sprint, Nextel, AT&T, Verizon Communications, Verizon Wireless, Cellco, Cingular Wireless, Cingular, SBC, Cellular One Group and VoiceStream ("Cell Phone Carriers") are providers of cellular telephone service, and/or control or wholly own subsidiaries which are providers of cellular telephone service.

50. Defendant Cell Phone Carriers are granted licenses by the FCC to broadcast wireless signals on specific

frequency bands to provide cellular telephone service to consumers.

51. Each manufacturer constructs WHHPs to fit the different specifications of the Cell Phone Carriers.

52. Each Cell Phone Carrier provides manufacturers and/or sellers of WHHPs with specifications based on its specific frequency band. The specifications of the battery and circuitry for all WHHPs in a Cell Phone Carrier's network are determined by the Cell Phone Carrier's license and frequency information granted by the FCC.

53. Each time a WHHP user makes or receives a call a wireless signal is transmitted from the WHHP antenna to the nearest cell tower or from the nearest cell tower to the WHHP antenna, thereby exposing the WHHP user to RFR.

54. Land lines also play a central role in the operation and use of WHHPs. Based upon the license granted by the FCC to and the frequency specifications provided to sellers and/or manufacturers of WHHPs, the Defendant Cell Phone Carriers create a network by which the wireless signal is transferred to land lines and the call is sent to a receiver or sent to the cell phone customer.

55. While placing and receiving calls, each named Plaintiff held their WHHP in the manner for which WHHPs were designed and intended to be used so that the receiver was resting against their ear ("Customary Position"), the manner in which other similarly situated Class Members customarily use their WHHPs.

56. Each time a named Plaintiff used their WHHP in the Customary Position, the antenna was located next to their head.

57. Each time a named Plaintiff used their WHHP, they were exposed to RFR which emanated from the antenna, thereby subjecting them to RFR and, in the absence of a headset, to RFR's biological effects and the risk to human health arising therefrom.

58. The health risk created by the Plaintiffs' use of their WHHPs is identical to the risk to which all other members of the Class were exposed.

59. Scientific and medical research, published in peer reviewed literature, has demonstrated biological injury from exposure to RFR within the radio frequency band of 300 megahertz to 2.4 gigahertz.

60. Appropriately designed headsets, when properly used, eliminate the WHHP users' exposure to RFR. Headsets to be used in conjunction with a WHHP have been commercially available at all relevant times.

61. Defendants have marketed headsets as an accessory at an additional cost.

62. Defendants were aware or should have been aware of numerous studies and experiments that demonstrated the health risks and biological effects of RFR dating back to the late 1920s.

63. As research and studies evolved over the ensuing decades, it was found, among other things, that animal research demonstrated physical injury and/or adverse biological effects as a result of varying levels of RFR.

64. That during this same period of time research was also forthcoming as to the risk to human health posed by exposure to RFR.

65. By the early 1960's, it was well established in the scientific and medical communities that RFR is efficiently absorbed into human tissue and is capable of producing biological injury.

66. It was equally well known in the scientific and medical community by that time that an antenna is the most efficient means of depositing RFR into the human body and penetrating human tissue and that the temporal lobe of the brain was the most sensitive area of the body to this type of radiation.

67. Medical and scientific inquiry and research into the harmful biological effects of RFR continued

unabated from the 1960's to the present day. Throughout this period, dozens of peer reviewed research papers were published which, individually and collectively, raised serious and credible questions regarding whether the RFR to which WHHP users were and are exposed posed a threat to their health.

68. The Defendants knew or, by the application of reasonable, developed human skill and foresight, should have known of the unreasonably dangerous characteristics of WHHPs because such knowledge was, at all times relevant to the claims herein, part of the "state of the art" body of knowledge in the relevant scientific and medical communities.

69. At all times relevant to the claims herein, the Defendants failed to conduct adequate testing and research regarding the dangerous characteristics of WHHPs. Not only did the Defendants fail to engage in pre-market testing of WHHPs, but after introducing WHHPs into the marketplace, the Defendants continued to fail to fulfill their ongoing obligation to conduct adequate testing and research regarding the dangerous characteristics of WHHPs.

70. Throughout this entire period, the Defendants, acting individually and collectively through their respective trade associations, took steps to suppress, discredit and/or minimize this emerging science.

71. Throughout this same period, the Defendants, acting individually and collectively through their respective trade associations, took steps to ensure that they would be free to manufacture and mass market WHHPs to the consuming public, free from the constraints of any reasonable and necessary safety standards regulating RFR exposure. They accomplished this by obtaining and exercising dominance and control over the American National Standards Institute ("ANSI") Committee responsible for developing safety standards for RFR emitting devices.

72. In 1966, long before Defendants began producing WHHPs, ANSI adopted an RFR exposure limit of 10 mW/cm^2 which was identified as ANSI Standard C95.1--1966 ("ANSI-1966"). However, this standard was based solely on the *thermal* effects associated with RFR and did not contemplate or consider the possibility that RFR exposure could give rise to non-thermal biological injury and subsequent adverse health effects. Nevertheless, prior to 1989, the Defendants relied upon this irrelevant ANSI Standard to make unfounded and improper representations to the consuming public, including the Plaintiff, that WHHPs were safe for their intended use without the use of a headset.

73. In 1989 at an ANSI meeting, representatives of the WHHP industry, including the Defendants herein, sought an exclusion for WHHPs from ANSI-1966. The Defendants' proposal would have exempted from ANSI-1966 all devices using less than seven (7) watts of power. Such an exclusion would have effectively exempted all WHHPs from ANSI-1966. At this initial meeting, the efforts of the Defendants and others to achieve the exclusion failed and the vote for the exclusion was defeated.

74. Approximately one month later a smaller group of the ANSI RFR Safety Standard Committee met and the exclusion clause was again pressed at the urging of the Defendants. On this occasion, the proposal was approved and WHHPs were exempted from ANSI-1966. As a consequence of this action, WHHPs were aggressively marketed thereafter without any safety standard to protect Plaintiff and other foreseeable users from the harmful effects of RFR exposure.

75. In the early 1990's, after successfully contriving to exempt themselves from ANSI regulation and as credible concerns continued to surface regarding the safety of WHHPs, the Defendants, individually and through their trade associations, undertook with great public fanfare to fund scientific inquiry into the potential health hazards

posed by the use of WHHPs. When this industry-funded research failed to corroborate the industry's reckless and premature claims of safety, and, in fact, presented new evidence of potential health concerns, the industry responded by terminating the research funding and publicly disparaging, suppressing and minimizing the results.

76. Despite their knowledge of the literature, research and the industry's own studies, the Defendants continued wrongfully to maintain that WHHPs posed no threat to human health despite mounting abundant evidence to the contrary.

77. At all relevant times, the biological injury caused by low level RFR of WHHPs which, in turn, gives rise to a risk to the users' health, was fully known and appreciated by the Defendants. At all relevant times, the Defendants should have and easily could have minimized, reduced and or eliminated this health risk by acknowledging its existence and providing to each purchaser of WHHPs a headset with appropriate instructions for use. The Defendants negligently and recklessly failed and/or refused to take this simple step to reduce the health risks to consumers for fear that such action would inhibit their ability to mass market WHHPs to the consuming public, including the Plaintiff and others similarly situated.

78. On January 26, 1993, Defendant Motorola announced to the news media, which subsequently reported to the public, that "thousands of studies" had already shown cellular phones were safe. This statement was fraudulent, deceitful, and misleading.

79. On July 16, 1993, in furtherance of its dishonest campaign to assure the consuming public of the "safety" of WHHP's, the Cellular Telecommunications Industry Association (CTIA), representing many of the named Defendants, held a press conference and issued a report entitled "Safety Update-Fast Facts: Portable Cell Phone Safety," which, in bold print, deceptively stated, the

following: **"Rest assured. Cellular telephones are safe."** The report further stated that cell phones fall within the safety standards of the Federal Communications Commission (FCC). However, the Defendants fraudulently and deceitfully omitted the fact that the FCC had declared that it does *not* consider itself the "expert agency" for evaluating health effects.

80. This industry deception prompted Elizabeth Jacobson, Deputy Director for Science at the Center for Devices and Radiological Health, Food and Drug Administration, on July 19, 1993 to send a letter to CTIA president Thomas Wheeler, which clearly questioned and challenged the misleading statements made by the Defendants to the public regarding the "safety" of WHHPs. In pertinent part, that letter stated:

> "I am writing to let you know that we were concerned about two important aspects of your press conference on July 16 concerning the safety of cellular phones, and to ask that you carefully consider the following comments when you make future statements to the press.
>
> First, both the written press statements and your verbal comments during the conference seemed to display an unwarranted confidence that these products will be found to be absolutely safe. In fact, the unremittingly upbeat tone of the press packet strongly implies that there can be no

> hazard, leading the reader to wonder why any further research would be needed at all. (Some readers might also wonder how impartial the research can be when its stated goal is "a determination to reassure consumers," and when the research sponsors predict in advance that "we expect the new research to reach the same conclusion, that the cellular phones are safe."). . . .
>
> We are even more concerned that your press statements did not accurately characterize the relationship between CTIA and the FDA. . . . [S]ince it is not yet clear whether we will help to direct the research program, it is premature to state that we will credential the research.
>
> To sum up, Mr. Wheeler, our role as a public health agency is to protect health and safety, not to "reassure consumers." I think it is very important that the public understand where we stand in evaluating the possibility that cellular phones might pose a health risk. . . .

81. In or about late 1993, or early 1994, the cell phone industry, including the named Defendants, through

CTIA, organized a committee to prepare a manual for public consumption discussing "responsible" WHHP use. After receiving a draft of the manual, Thomas Wheeler, president of CTIA, sent a memorandum to the drafting committee expressing his concerns over certain language in the draft which acknowledged and/or implied that the use of WHHPs could pose health risks. Mr. Wheeler's memorandum suggested significant substantive deletions from the draft which are set forth. The committee deleted the offending material set forth here in bold typeface:

> Do not operate your transportable cellular telephone when holding the antenna, or when any person is within 4 inches
>
> (10 centimeters) of the antenna. **Otherwise you may impair call quality, may cause your phone to operate at a higher power level than is necessary, and may expose that person to RF energy in excess of the levels established by the updated ANSI Standard.**
>
> **If you want to limit RF exposure even further, you may choose to control the duration of your calls or maintain a distances from the antenna of more than 4 inches (10 centimeters).**

> For best call quality, keep the antenna free from obstructions and point it straight up."

82. At some point subsequent to, and as a direct consequence of the filing of other proceedings raising concerns about biological injury from RFR, the Defendants (or some of them) began to provide to purchasers (or lessees) of WHHPs a copy of the U.S. Food and Drug Administration's ("FDA") "Update on Mobile Phones" (dated 10/2000). This document was inserted by the Defendants into the marketing package for newly purchased WHHPs.

83. The FDA's "Update on Mobile Phones" instructs the consuming public to the following effect:

> **The U.S. Food and Drug Administration's Center for Devices and Radiological Health Consumer Update on Mobile Phones.**
>
> **...Why the concern?**
>
> Mobile phones emit low levels of radio frequency energy (i.e., radio frequency radiation) in the microwave range while being used. They also emit very low levels of radio frequency energy (RF), considered non-significant, when in the stand-by mode. It is well known that high levels of RF can produce biological damage through heating effects (this is how your microwave oven is able to cook food).

However, *it is not known whether, to what extent, or through what mechanism, lower levels of RF might cause adverse health effects as well. Although some research has been done to address these questions, no clear picture of the biological effects of this type of radiation bar emerged to date. Thus, the available science does not allow us to conclude that mobile phones are absolutely safe, or that they are unsafe.* (Emphasis added). . . .

How much evidence a there that hand-held mobile phones might be harmful?

Briefly, there is not enough evidence to know for sure, either way: however, research efforts are on-going. The existing scientific evidence is conflicting and many of the studies that have been done to date have suffered from flaws in their research methods.

...What is FDA's role concerning the safety of mobile phones?

Under the law, FDA does not review the safety of radiation

emitting consumer products such as mobile phones before marketing, as it does with new drugs or medical devices. . .

Although the existing scientific data do not justify FDA regulatory actions at this time, FDA has urged the mobile phone industry to take a number of steps to assure public safety. The agency has recommended that the industry:

- support needed research into possible biological effects of RF of the type emitted by mobile phones;
- design mobile phones in a way that minimizes any RF exposure to the user that is not necessary for device function; and
- cooperate in providing mobile phone

users with the best possible information on what is known about possible effects of mobile phone use on human health.

84. Plaintiffs and others similarly situated were and continue to be misinformed, misled and deceived by the Defendants into believing that WHHPs are safe and pose no threat to human health.

85. Defendants at all relevant times have controlled the design, assembly, platform for usage, manufacture, marketing sales and provision of service of WHHPs which have been widely advertised by the Defendants as posing no threat to human health.

86. The product warnings in effect during the period relevant to this Complaint were both substantively and graphically wholly inadequate to alert Plaintiffs and those similarly situated as to the risks associated with WHHP use.

87. Defendants have never adequately informed the public about the risk of biological injury which poses a health risk to WHHP users or of the fact that the risk of injury can differ with the amount of use and the sensitivity of the user.

VI. CLAIMS FOR RELIEF

COUNT I

STRICT PRODUCT LIABILITY - FAILURE TO WARN

88. The Plaintiffs on behalf of themselves, and others similarly situated, hereby incorporate by reference, as if fully set forth herein, all of the foregoing paragraphs of the Complaint, and further allege as follows.

89. Defendants are manufacturers, suppliers and/or service providers of WHHPs and are engaged in the design, manufacture, sale and provision of service, of WHHPs.

90. The WHHPs purchased by Plaintiffs were placed in the stream of commerce, sold and activated by the Defendants in a defective and unreasonably dangerous condition in that the WHHPs failed to include a proper warning regarding all possible adverse health effects associated with the use of WHHPs and the harmful effects of the radiation emitted from WHHPs to the Plaintiffs and those similarly situated. The other Defendants, in like manner, failed to include a proper warning to the other members of the Class regarding all possible adverse health effects associated with the use of WHHPs and the harmful effects of the radiation emitted from WHHPs.

91. The WHHPs manufactured and/or supplied by the Defendants reached the Plaintiffs and others similarly situated without any substantial change in their condition and were in that same condition when used by Plaintiffs and others similarly situated.

92. Defendants Motorola, Verizon Wireless, AT&T, CEI and Baltimore Communications also failed to warn Plaintiffs and others similarly situated that other methods for using WHHPs were available, such as, but not limited to, a headset which would have prevented the

adverse health effects associated with the use of WHHPs. The other Defendants, in like manner, also failed to warn the other members of the Class that other methods for using WHHPs were available, such as, but not limited to, a headset which would have prevented the adverse health effects associated with the use of WHHPs.

93. The Defendants knew or, by the application of reasonable, developed human skill and foresight, should have known of the unreasonably dangerous characteristics of the WHHPs because such knowledge was, at all times relevant to the claims herein, part of the "state of the art" body of knowledge in the relevant scientific and medical communities.

94. At all times relevant to the claims herein, the Defendants failed to conduct adequate testing and research regarding the dangerous characteristics of WHHPs. Not only did the Defendants fail to engage in pre-market testing of WHHPs, but after introducing WHHPs into the marketplace, the Defendants continued to fail to fulfill their ongoing obligation to conduct adequate testing and research regarding the dangerous characteristics of WHHPs.

95. The WHHPs purchased by the Plaintiffs were defective and unreasonably dangerous due to inadequate warnings or instructions because, after Defendants knew or should have known of the risk of injury from its use, Defendants failed to provide adequate warnings or instructions to Plaintiffs and others similarly situated as herein alleged. Defendants continued to aggressively promote the product and failed to provide a headset to Plaintiffs and others similarly situated. The other Defendants, in like manner, failed to provide adequate warnings or instructions to the other members of the Class.

96. The failure to provide a warning or instruction as herein alleged or to provide a headset, made WHHPs unreasonably dangerous.

97. The product warnings in effect during the period relevant to this Complaint were both substantively and graphically wholly inadequate to alert Plaintiffs and those similarly situated as to the risks associated with WHHP use.

98. Defendants have never adequately informed the public about the risk of biological injury which poses a health risk to WHHP users or of the fact that the risk of injury can differ with the amount of use and the sensitivity of the user.

99. As a direct and proximate result of the defective and unreasonably dangerous condition of the WHHP as alleged above, Plaintiffs, and others similarly situated, was and continues to be exposed to a health risk.

100. At all times relevant hereto, the Defendants actually knew of the defective nature of WHHPs as herein set forth and continued to design, manufacture, market, sell and provide service for WHHPs so as to maximize sales and profits at the expense of public health and safety. At all relevant times the Defendants Motorola, Verizon Wireless, AT&T, CEI and Baltimore Communications as well as the other Defendants, could have eliminated or significantly mitigated the health risk alleged herein by acknowledging its existence and providing purchasers such as the Plaintiff with a headset with appropriate warnings and instructions for use. The Defendants' abject refusal or failure to so act was motivated solely by their desire to maximize sales and profits at the expense of the users' health.

WHEREFORE, Plaintiffs pray for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff J. Douglas Pitney and for each Class Member;

b. Reimbursing Plaintiff Patricia S. Colonell and for each Class Member purchaser or lessee of

a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For punitive damages to Plaintiffs and other members of the Class;

f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

g. For costs, attorney fees, and legal pre-judgment interest; and

h. An Order certifying the Class and appointing the Plaintiffs and their counsel to represent the Class.

COUNT II

STRICT PRODUCT LIABILITY

DESIGN OR MANUFACTURING DEFECT

101. The Plaintiffs on behalf of themselves, and others similarly situated, hereby incorporate by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further allege as follows.

102. The WHHPs designed, manufactured and/or supplied by Defendants Motorola, Verizon Wireless, AT&T, CEI and Baltimore Communications were defective in design and or manufacture because when they were placed in the stream of commerce they failed to contain or incorporate a headset to eliminate or reduce the users' exposure to RFR. The WHHPs sold or supplied by the other Defendants to the

other members of the Class also failed to include or incorporate a headset.

103. The Defendants knew or, by the application of reasonable, developed human skill and foresight, should have known of the unreasonably dangerous characteristics of the WHHPs because such knowledge was, at all times relevant to the claims herein, part of the "state of the art" body of knowledge in the relevant scientific and medical communities.

104. At all times relevant to the claims herein, the Defendants failed to conduct adequate testing and research regarding the dangerous characteristics of WHHPs. Not only did the Defendants fail to engage in pre-market testing of WHHPs, but after introducing WHHPs into the marketplace, the Defendants continued to fail to fulfill their ongoing obligation to conduct adequate testing and research regarding the dangerous characteristics of WHHPs.

105. The WHHPs reached Plaintiffs and others similarly situated without substantial change in their condition and were in that same condition at the time of the use alleged.

106. The design or manufacturing defect alleged herein rendered the Plaintiffs' WHHPs unreasonably dangerous when used in the manner intended by the Defendants and as a result, the Defendants are strictly liable to the Plaintiffs as are the other Defendants to the other members of the Class.

107. At the time that the WHHPs left the Defendants' possession, the WHHPs were unreasonably dangerous to the Plaintiffs and others similarly situated and the Defendants had a safe alternative or modification, which was economically feasible.

108. As a direct and proximate result of the defective and unreasonably dangerous condition of WHHPs as manufactured and/or supplied by Defendants, Plaintiffs and others similarly situated were exposed to a health risk.

109. At all times relevant hereto, Defendants actually knew of the defective nature of WHHPs as herein set forth and continued to design, manufacture, market, sell and provide service for WHHPs so as to maximize sales and profits at the expense of public health and safety. At all relevant times the Defendants Motorola, Verizon Wireless, AT&T, CEI and Baltimore Communications as well as the other Defendants, could have eliminated or significantly mitigated the health risk alleged herein by acknowledging its existence and providing purchasers such as the Plaintiffs with a headset with appropriate warnings and instructions for use. The Defendants' abject refusal or failure to so act was motivated solely by their desire to maximize sales and profits at the expense of the users' health.

WHEREFORE, Plaintiffs pray for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff J. Douglas Pinney and for each Class Member;

b. Reimbursing Plaintiff Patricia S. Colonell and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For punitive damages to Plaintiffs and other members of the Class;

f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

g. For costs, attorney fees, and legal pre-judgment interest; and

h. An Order certifying the Class and appointing the Plaintiffs and their counsel to represent the Class.

COUNT III

VIOLATIONS OF MARYLAND CONSUMER PROTECTION ACT

110. The Plaintiffs on behalf of themselves, and others similarly situated, hereby incorporate by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further allege as follows.

111. Section 13-408 of the Maryland Consumer Protection Act, Md. Com. Law Code Ann. § 13-101 et seq., authorizes Plaintiffs, and others similarly situated, to bring an action to recover for loss sustained as a result of a practice prohibited by the Act.

112. By engaging in the conduct described above, the Defendants have violated § 13-301(1), (2), (3) and (9) of the Consumer Protection Act by, among other things:

a. engaging in unfair and deceptive trade practices as defined in § 13-301(1) by making false and misleading oral and written statements that had, and have, the capacity, tendency or effect of deceiving or misleading Maryland consumers and Plaintiffs and others similarly situated;

b. engaging in unfair or deceptive trade practices as defined in § 13-301(2)(i) by making

representations that WHHPs have an approval, characteristics, use or benefit which they do not have, including, but not limited to, the Defendants' statements concerning the lack of detrimental health consequences of the use of WHHPs when used without a headset;

c. engaging in unfair or deceptive trade practices as defined in § 13-301(3) by failing to state material facts the omission of which deceived or tended to deceive, including, but not limited to, facts relating to the lack of detrimental health consequences of the use of WHHPs when used without a headset; and

d. engaging in unfair or deceptive trade practices as defined in § 13-301(9)(i) through their deception, fraud, misrepresentation and knowing concealment, suppression and omission of material facts with the intent that Maryland consumers, including Plaintiffs and others similarly situated, rely upon the same in connection with the purchase and use of WHHPs.

113. To remedy these violations, it is requested that damages be awarded for the losses sustained by Plaintiffs, and others similarly situated, and reasonable attorneys' fees pursuant to § 13-408 of the Consumer Protection Act.

114. As a direct and proximate result of the Defendants' violation of Maryland law, Plaintiffs and others similarly situated were exposed to biological injury resulting in a health risk.

WHEREFORE, Plaintiffs pray for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff J. Douglas Pinney and for each Class Member;

b. Reimbursing Plaintiff Patricia S. Colonell and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

f. For costs, attorney fees, and legal pre-judgment interest; and

g. An Order certifying the Class and appointing the Plaintiffs and their counsel to represent the Class.

COUNT IV

BREACH OF IMPLIED WARRANTIES

115. The Plaintiffs on behalf of themselves, and others similarly situated, hereby incorporate by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further allege as follows.

116. Under Maryland common and statutory law, a warranty of merchantability is implied in all sales transactions. A warranty of merchantability is a warranty implied by law that a product is fit for the ordinary use for which it is used, is properly labeled and conforms to the representations made about it. See Md. Code Ann., Com. Law. §§ 2-314 (2001).

117. At the time Defendants marketed, sold and distributed WHHPs for use by Plaintiffs and others similarly situated, Defendants knew of the use for which WHHPs were intended and impliedly warranted the product to be of merchantable quality and safe and fit for such use.

118. The other Defendants, in like manner, impliedly so warranted WHHPs to members of the Class who purchased or leased WHHPs from these other manufacturers and/or sellers.

119. Plaintiffs and others similarly situated, used and/or operated the WHHPs as they were intended to be used and in the manner foreseeable by Defendants.

120. Defendants Motorola, Verizon Wireless, AT&T, CEI and Baltimore Communications breached said warranty, as did the other Defendants to those similarly situated in that the WHHPs created a health risk and were unfit for ordinary and intended use as described above in failing to include a headset which shielded or protected users from RFR.

121. As a direct and proximate result of the Defendants' breach, Plaintiffs, and others similarly situated, were subjected to a health risk.

WHEREFORE, Plaintiffs pray for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff J. Douglas Pinney and for each Class Member;

b. Reimbursing Plaintiff Patricia S. Colonell and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

f. For costs, attorney fees, and legal pre-judgment interest; and

g. An Order certifying the Class and appointing the Plaintiffs and their counsel to represent the Class.

COUNT V

NEGLIGENCE

122. The Plaintiffs on behalf of themselves, and others similarly situated, hereby incorporate by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further allege as follows.

123. Defendants are manufacturers, suppliers and/or service providers of WHHPs and are engaged in the

design, manufacture, sale and provision of service of WHHPs.

124. Defendants Motorola, Verizon Wireless, AT&T, CEI and Baltimore Communications owed the Plaintiffs and others similarly situated to whom it sold or leased a WHHP the duty of care to design, manufacture, test, market, distribute and sell WHHPs with appropriate instructions and warnings in a reasonable and safe manner. The other Defendants owed an identical duty to those members of the class to whom they sold or leased WHHPs.

125. Defendants knew or should have known of the biological injury and the resulting health risks associated with RFR emissions from WHHPs.

126. At all times during the design, manufacture, testing, marketing, sale and provision of service of WHHPs, it was reasonably foreseeable to Defendants that individuals, including Plaintiffs, who used WHHPs would be exposed to levels of RFR which posed health risks.

127. The Defendants knew or, by the application of reasonable, developed human skill and foresight, should have known of the unreasonably dangerous characteristics of the WHHPs because such knowledge was, at all times relevant to the claims herein, part of the "state of the art" body of knowledge in the relevant scientific and medical communities.

128. At all times relevant to the claims herein, the Defendants failed to conduct adequate testing and research regarding the dangerous characteristics of WHHPs. Not only did the Defendants fail to engage in pre-market testing of WHHPs, but after introducing WHHPs into the marketplace, the Defendants continued to fail to fulfill their ongoing obligation to conduct adequate testing and research regarding the dangerous characteristics of WHHPs.

129. Defendants knew or should have known that Plaintiffs and others similarly situated would be subjected to a health risk and suffer biological injury as a result of their

failure to exercise ordinary and reasonable care. The other Defendants knew or should have known that others similarly situated to the Plaintiffs would be subjected to a health risk and suffer biological injury as a result of their failure to exercise ordinary and reasonable care.

130. Defendants Motorola, Verizon Wireless, AT&T, CEI and Baltimore Communications breached their duty of care to the Plaintiffs and others similarly situated by: failing to conduct adequate and appropriate scientific research and testing on the issue of adverse health effects from exposure to WHHP generated RFR; negligently misrepresenting to the consuming public, including the Plaintiffs herein, that WHHPs posed no threat to human health and were "safe" for intended use; suppressing or disparaging scientific evidence suggesting a potential for harm to human health from WHHP RFR; failing to provide headsets and instructions encouraging the use thereof to purchasers and lessees of WHHPs; and failing to warn purchasers and lessees of the potential health risks arising from using a WHHP without a headset. In like manner, the other Defendants breached their duty to the other members of the Class.

131. As a direct and proximate result of Defendants' negligence, Plaintiffs, and others similarly situated, were exposed to a health risk.

132. At all times relevant, Plaintiffs, and others similarly situated, acted with due care and without negligently contributing to the health risk or biological injury alleged herein.

133. At all times relevant hereto, the Defendants actually knew of the defective nature of WHHPs as herein set forth and continued to design, manufacture, market, sell and provide service for WHHPs so as to maximize sales and profits at the expense of public health and safety. At all relevant times Defendants Motorola, Verizon Wireless, AT&T, CEI and Baltimore Communications, as well as the

other Defendants, could have eliminated or significantly mitigated the health risk alleged herein by acknowledging its existence and providing purchasers such as the Plaintiffs with a headset with appropriate warnings and instructions for use. The Defendants' abject refusal or failure to so act was motivated solely by their desire to maximize sales and profits at the expense of the users' health.

WHEREFORE, Plaintiffs pray for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff J. Douglas Pinney and for each Class Member;

b. Reimbursing Plaintiff Patricia S. Colonell and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For punitive damages to Plaintiffs and other members of the Class;

f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

g. For costs, attorney fees, and legal pre-judgment interest; and

h. An Order certifying the Class and appointing the Plaintiffs and their counsel to represent the Class.

COUNT VI

FRAUD

134. The Plaintiffs on behalf of themselves, and others similarly situated, hereby incorporate by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further allege as follows.

135. Defendants Motorola, Verizon Wireless, AT&T, CEI and Baltimore Communications made false representations of material facts to the public and to Plaintiffs. The Defendant led the public and the Plaintiffs to believe under false pretenses that WHHPs were safe and did not create a health risk or cause biological injury.

136. The remaining Defendants made false representations of material facts to other members of the Class and led them to believe under false pretenses that WHHPs were safe and did not create a health risk or cause biological injury.

137. Defendants knew these representations were false or they made these representations with such reckless disregard for the truth that the falsity can be imputed to them.

138. Defendants were acting al all times relevant within the scope of their business for their own economic and pecuniary benefit.

139. Defendants made these false misrepresentations in order to defraud the public, other members of the Class, and therefore Plaintiffs; Defendants committed fraud by, among other things: (1) failing to adequately test WHHPs and failing to inform the public that such WHHPs did not meet safety standards; (2) misstating to Plaintiffs and others similarly situated through advertising and testimonials that WHHPs are safe; and (3) otherwise committing fraud which upon information and belief will be proven through documentary evidence, which is in the possession of the Defendants.

140. Plaintiffs, and others similarly situated, justifiably relied on the false representations made by the Defendants, and as a direct result suffered damages.

141. As a direct and proximate result of Defendants' fraud, Plaintiffs and others similarly situated were exposed to a health risk and sustained biological injuries.

142. At all times relevant hereto, the Defendants actually knew of the defective nature of WHHPs as herein set forth and continued to provide service for; design, manufacture, market and sell WHHPs so as to maximize sales and profits at the expense of public health and safety. Defendants' conduct is such as to establish that their actions were a result of fraud, evil motive, actual malice, and the conscious and deliberate disregard of foreseeable health risk and biological injury to Plaintiffs and others similarly situated. Therefore, Plaintiffs and others similarly situated are entitled to punitive damages.

WHEREFORE, Plaintiffs pray for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff Douglas Pinney and for each Class Member;

b. Reimbursing Plaintiff Patricia S. Colonell and each for Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For punitive damages to Plaintiffs and other members of the Class;

f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

g. For costs, attorney fees, and legal pre-judgment interest; and

h. An Order certifying the Class and appointing the Plaintiffs and their counsel to represent the Class.

COUNT VII

FRAUD BY CONCEALMENT

143. The Plaintiffs on behalf of themselves, and others similarly situated, hereby incorporate by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further allege as follows.

144. Defendants Motorola, Verizon Wireless, AT&T, CEI and Baltimore Communications intentionally concealed their knowledge of material facts from the public and the Plaintiffs. The Defendant intentionally led the public and the Plaintiffs to believe under false pretenses that WHHPs were safe and did not create a health risk or cause biological injury.

145. The remaining Defendants intentionally concealed their knowledge of material facts to other members of the Class and led them to believe under false pretenses that WHHPs were safe and did not create a health risk or cause biological injury.

146. Defendants were acting at all times relevant within the scope of their business for their own economic and pecuniary benefit.

147. Defendants intentionally concealed their knowledge of the health risks and biological injuries caused by RFR emitted by WHHPs in order to defraud the public, other members of the Class, and the Plaintiffs. Defendants

committed fraud by, among other things: (1) intentionally concealing evidence, as alleged in this Complaint, that would have demonstrated to the Plaintiffs, and others similarly situated, that WHHPs are not safe for use; (2) as alleged throughout this Complaint, intentionally failing to warn Plaintiffs, and others similarly situated, of research that indicated an association between RFR from WHHPs and health risks and biological injury; and (3) otherwise committing fraud which, upon information and belief, will be proven through documentary evidence, which is in the possession of the Defendants.

148. As a direct and proximate result of Defendants' concealment, Plaintiffs and other similarly situated were exposed to a health risk and sustained biological injuries.

149. At all times relevant hereto, the Defendants actually knew of the defective nature of WHHPs as set forth herein and continued to provide service for, design, manufacture, market and sell WHHPs so as to maximize sales and profits at the expense of public health and safety. Defendants' conduct is such as to establish that their actions were a result of fraud, evil motive, actual malice, and the conscious and deliberate disregard of foreseeable health risk and biological injury to Plaintiffs and others similarly situated. Therefore, Plaintiffs and others similarly situated are entitled to punitive damages.

WHEREFORE, Plaintiffs pray for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff J. Douglas Pinney and for each Class Member;

b. Reimbursing Plaintiff Patricia S. Colonell and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For punitive damages to Plaintiffs and other members of the Class;

f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

g. For costs, attorney fees, and legal pre-judgment interest; and

h. An Order certifying the Class and appointing the Plaintiffs and their counsel to represent the Class.

COUNT VIII

CIVIL CONSPIRACY

150. The Plaintiffs on behalf of themselves, and others similarly situated, hereby incorporate by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further allege as follows.

151. At all times relevant and to the present time, Defendants formed confederacies, trade associations or affiliations (CTIA, Telecommunications Industry Association ("TIA") and Wireless Telephone Research ("WTR")) and entered into agreements and/or tacit understandings to jointly, and in conspiracy with each other, market, in disregard of the obligations they owed the consuming public, through warranties and otherwise, unreasonably dangerous and defective WHHPs. They conducted their marketing by improper and wrongful means, including suppressing information related to the health risks

and biological injury associated with RFR emissions from WHHPs, and placing into the stream of commerce dangerously defective WHHPs. In so doing, Defendants defrauded Plaintiffs, and others similarly situated, and failed to warn Plaintiffs and others similarly situated, of the biological injury and resulting health risks associated with WHHPs.

152. Defendants acted collectively in:

a. marketing, producing and promoting the use of WHHPs without proper tests or warnings and without regard to the dangerous RFR emitted therefrom and its effects upon Plaintiffs and others similarly situated;

b. suppressing, discouraging and/or retarding appropriate research, testing, regulation and public dissemination of information concerning RFR emissions and the effects those emissions would have on the Plaintiffs and others similarly situated; and

c. ignoring, disparaging, or misleading the public about medical and scientific data available to them which clearly indicated that RFR emissions from WHHPs create biological injury and resulting health risks.

153. Through the foregoing course of conduct, Defendants conspired to breach the warranties and commit the tortious acts described in this Complaint, in furtherance

of their agreement or understanding to promote and market WHHPs.

154. The Defendants knew or, by the application of reasonable, developed human skill and foresight, should have known of the unreasonably dangerous characteristics of the WHHPs because such knowledge was, at all times relevant to the claims herein, part of the "state of the art" body of knowledge in the relevant scientific and medical communities.

155. At all times relevant to the claims herein, the Defendants failed to conduct adequate testing and research regarding the dangerous characteristics of WHHPs. Not only did the Defendants fail to engage in pre-market testing of WHHPs, but after introducing WHHPs into the marketplace, the Defendants continued to fail to fulfill their ongoing obligation to conduct adequate testing and research regarding the dangerous characteristics of WHHPs.

156. Defendants were aware of the health risks and potential biological injury to those exposed to RFR emissions from WHHPs prior to the use of same by Plaintiffs and others similarly situated.

157. At all relevant times, notwithstanding their knowledge of the health risks of RFR emission from WHHPs, Defendants collectively thwarted efforts to regulate and control RFR emissions of WHHPs.

158. Notwithstanding their extensive knowledge of the health risks of RFR emissions from WHHPs, Defendants continued to promote WHHPs as appropriate for use and, in so doing, defrauded the Plaintiffs and otters similarly situated into believing WHHPs are safe without the use of a headset.

159. Defendants, acting collectively, to this very day, have failed and continue to fail to properly instruct and warn consumers about the health risks and biological injury associated with RFR emissions from WHHPs, notwithstanding Defendants' knowledge of same.

160. At all relevant times, notwithstanding their knowledge of the health risks of RFR emissions from WHHPs, Defendants continued, and continue to this very day, to place into the stream of commerce dangerous and defective WHHPs without providing a headset.

161. Defendants' collective, conspiratorial and tortious activities were knowingly and purposefully designed for their own economic and pecuniary benefit and were performed in furtherance of Defendants' respective and joint business interests.

162. As a direct and proximate result of Defendants' conduct, Plaintiffs and others similarly situated are being and will be exposed to a health risk due to the failure of Defendants to provide a headset.

163. At all times relevant hereto, the Defendants actually knew of the defective nature of WHHPs, as herein set forth, and continued to design, manufacture, market, sell and/or provide service for WHHPs so as to maximize sales and profits at the expense of public health and safety. Defendants' conduct is such as to establish that their actions were a result of fraud, evil motive, actual malice, and the conscious and deliberate disregard of foreseeable health threats to Plaintiffs and others similarly situated. Plaintiffs and others similarly situated are entitled to damages, punitive and compensatory.

WHEREFORE, Plaintiffs pray for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff J. Douglas Pinney and for each Class Member;

b. Reimbursing Plaintiff Patricia S. Colonell and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For punitive damages to Plaintiffs and other members of the Class;

f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

g. For costs, attorney fees, and legal pre-judgment interest; and

h. An Order certifying the Class and appointing the Plaintiffs and their counsel to represent the Class.

VII. JURY DEMAND

Plaintiffs hereby demand a trial by jury for such issues as may be tried by a jury.

s/Peter G. Angelos
Peter G. Angelos
H. Russell Smouse
John A. Pica, Jr.
Law Offices of Peter G. Angelos, P.C:
100 N. Charles Street
One Charles Center, 19th Floor
Baltimore, Maryland 21201
(410)649-2000
Attorneys for Plaintiffs

APPENDIX E

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

APRIL TERM 2001

Kenneth A. Jacobsen
Identification No. 31208
Nancy B. Grogan
Identification No. 49483
LAW OFFICES OF
KENNETH A. JACOBSEN
22 West Front Street
Media, PA 19063
(610) 566-7930

LAW OFFICES OF PETER G. ANGELOS
The John Wanamaker Building
100 Penn Square East
Suite 1050, 10th Floor
Philadelphia, PA 19107
(215) 963-9333

Joseph A. O'Keefe
Identification No. 77068
O'KEEFE & SHER, P.C.
15019 Kutztown Road
Kutztown, PA 19530
(610) 683-0771

LOWE, STEIN, HOFFMAN,
ALL WEISS & HAUVER, LLP
701 Poydras Street
One Shell Square, Suite 3[illegible]
New Orleans, LA 70139

(504) 581-2450

Attorneys for Plaintiff

FRANCIS J. FARINA
577 Gregory Lane
Devon, PA 19333
individually and on behalf of
all those similarly situated,
Plaintiff,

v.

NOKIA INC.
600 Connection Drive
Irving, TX 75039
and
NEC AMERICA
8 Old Sod Farm Road
Melville, NY 11747
and
ERICSSON WIRELESS COMM., INC
740 East Campbell Road
Richardson, Texas 75081
and
MOTOROLA, INC.
5725 E. River road
Chicago, Illinois 60631
and
SPRINT PCS LIMITED PARTNERSHIP
A/K/A Sprint Spectrum
A/K/A Sprint
4900 Main Street, 12th Floor
Kansas City, Missouri 64112
and
AUDIOVOX COMMUNICATIONS

CORPORATION
A/K/A Audiovox Corporation
150 Marcus Boulevard
Hauppauge, New York 11788
and
NEXTEL COMMUNICATIONS, INC.
A/K/A Nextel
A/K/A Nextel Communications of the
Mid Atlantic, Inc.
A/K/A Nextel Partners, Inc.
2001 Edmund Halley Drive
Reston, Virginia 20191
and
MATSUSHITA CORPORATION
OF AMERICA
A/K/A Panasonic Corporation
9401 West Grand Avenue
Franklin Park, Illinois 60131
and
PHILIPS ELECTRONIC NORTH
AMERICA CORP.
100 East 42nd Street
New York, NY 10017
and
QUALCOMM INCORPORATED
A/K/A Qualcomm, Inc.
6455 Lusk Boulevard
San Diego, California 92121
and
SAMSUNG ELECTRONICS
AMERICA, INC.
A/K/A Samsung electronics
105 Challenger Road
Ridgefield Park, NJ 07660
and
SANYO NORTH AMERICA, INC.

A/K/A Sanyo North America Group
218 State Route 17 North
Rochelle Park, New Jersey 07662
and
SONY ELECTRONICS, INC.
The Corporation Trust Incorporated
300 East Lombard Street
Baltimore, Maryland 21202
and
AT&T CORP.
A/K/A AT&T
195 Broadway
New York, New York
and
VERIZON COMMUNICATIONS, INC.
Formerly Known As:
Bell Atlantic Corporation
1 East Pratt Street
Constellation Plaza
Baltimore, MD 21202
and
VERIZON WIRELESS
A/K/A Bell Atlantic Nynex
A/K/A Nynex
A/K/A Bell Atlantic Mobile, Inc.
Formerly Known As:
Bell Atlantic Nynex Mobile, Inc.
180 Washington Valley Road
Bedminster, New Jersey 07921
and
CELLCO PARTNERSHIP
d/b/a Verizon Wireless
formerly d/b/a/ Bell Atlantic Mobile
formerly d/b/a/ Bell Atlantic NYNEX Mobile
180 Washington Valley Road
Bedminster, New Jersey 07921

and

CINGULAR WIRELESS LLC
Formerly Known As:
Southwestern Bell Mobile Systems, Inc.
A/K/A Southwester Bell Wireless
2711 Centerville Road, Site 400
Wilmington, DE 19808

and

SBC COMMUNIC ` TIONS INC.
175 East Houston Street
San Antonio, Texas 78205

and

CELLULAR ONE GROUP
A/K/A Cellular One
5001 Lyndon B. Johnson Freeway
Suite 700
Dallas, Texas 75244

and

VOICESTREAM WIRELESS CORPORATION
A/K/A VoiceStream Wireless
3650 131st Avenue SE, Suite 200
Bellvue, Washington 98006

and

COMCAST/METROPHONE
1234 Market Street
Philadelphia, PA 19090

and

JOHN DOES NOS. 1-100,

Defendants.

NO. 002527

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Francis J. Farina brings this class action pursuant to Rule 1701 et seq. of the Pennsylvania Rules of Civil Procedure individually and on behalf all others similarly situated, and alleges the following:

I. INTRODUCTION

1. This class action seeks damages and declaratory and injunctive relief on behalf plaintiff and a class of persons who purchased or leased wireless handheld telephones ("WHHPs").

2. Through a common and uniform course of conduct, the defendants have manufactured, supplied, promoted, sold, leased and provided wireless service for WHHPs when they knew or should have known that their products generate and emit radio frequency radiation ("RFR") that causes an adverse cellular reaction and/or cellular dysfunction ("biological injury") through its adverse health effects on: calcium and ion distribution across the cell membrane; melatonin production; neurological function; DNA single and double strand breaks and chromosome damage; enzyme activities; cell stress and gene transcription; and the permeability of the blood brain barrier (hereinafter collectively described as "the health risk" and/or "the biological effects").

3. Through a common and uniform course of conduct, the defendants acting individually and collectively, failed to adequately disclose to the consuming public the fact that WHHPs emit RFR that causes biological injury and a risk to the users'health.

4. The purpose of this action is to hold accountable and to obtain maximum legal and equitable

relief from those corporations and entities that are responsible for producing and placing into the stream of commerce WHHPs which create a health risk to users by causing biological injury.

II. THE PARTIES

5. Plaintiff Francis J. Farina is as adult individual who resides at 577 Gregory Lane, Devon, Pennsylvania. On or about May 1, 1997 and October 1, 1988, plaintiff purchased WHHPs from defendant Verizon Communications, Inc. (then Bell Atlantic) and defendant AT&T, respectively.

6. At all times relevant to this Complaint, defendant NOKIA, Inc. a/k/a Nokia Mobile Phones, Inc. ('Nokia") was a Delaware corporation with its principal place of business at 6000 Connection Drive, Irving, Texas 75039. At all times relevant herein, Nokia, through its agents distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs . nationally and internationally.

7. At all times relevant to this Complaint, defendant NEC AMERICA, INC. ("NEC") was a corporation organized and existing under the laws of the State of New York, with its principal place of business at 8 Old Sod Farm Road, Melville, New York 11747. At all times relevant herein, NEC, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

8. At all times relevant to this Complaint, defendant ERICSSON WIRELESS COMMUNICATIONS, INC. a/k/a Ericsson, Inc. ("Ericsson") was a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 740 East Campbell Road, Richardson, Texas 75081. At all times

relevant herein, Ericsson, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

9. At all times relevant to this Complaint, defendant Motorola, Inc. ('Motorola") was a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 5725 E. River Road, Chicago, Illinois 60631. At all times relevant herein, Motorola, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

10. At all times relevant to this Complaint, defendant Sprint PCS Limited Partnership, A/K/A Sprint Spectrum, A/K/A Sprint, formerly known as, Bell Atlantic Maryland, Inc. ("Sprint") was a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 4900 Main Street, 12th Floor, Kansas City, Missouri 64112. At all times relevant herein, Sprint, through its agents, distributors, servants and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

11. At all times relevant to this Complaint, defendant Audiovox Communications Corporation A/K/A Audiovox Corporation ("Audiovox") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business in the State of New York at 150 Marcus Blvd, Hauppauge, New York 11788. At all times relevant herein, Audiovox, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

12. At all times relevant to this Complaint, defendant Nextel Communications, Inc., A/K/A Nextel,

A/K/A Nextel Communications of the Mid-Atlantic, Inc., A/K/A Nextel Partners, Inc. ("Nextel") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 2001 Edmund Halley Drive, Reston, Virginia 20191. At all times relevant herein, Nextel, through its agents, distributors, servants and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services, as well as to cellular telephone owners and users throughout its service areas.

13. At all times relevant to this Complaint, defendant Matsushita Corporation of America A/K/A Panasonic Corporation ("Panasonic") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 9401 West Grand Avenue, Franklin Park, Illinois 60131. At all time relevant herein, Panasonic, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

14. At all times relevant to this Complaint, defendant Philips Electronic North America Corporation ("Philips") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 100 East 42nd Street, New York, New York 10017. At all times relevant herein, Philips, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

15. At all times relevant to this Complaint, defendant Qualcomm Incorporated A/K/A Qualcomm, Inc. ("Qualcomm") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 6455 Lusk Boulevard, San Diego, California 92121. At all times relevant herein, Qualcomm, through its agents, distributors, servants and/or employees

engaged in the design, manufacture, marketing and sale of WHHPs and WHHP services nationally and internationally.

16. At all times relevant to this Complaint, defendant Samsung Electronics America, Inc. A/K/A Samsung Electronics ("Samsung") was a corporation having its principal place of business at 105 Challenger Road, Ridgefield Park, NJ 107660. At all times relevant herein, Samsung, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

17. At all times relevant to this Complaint; defendant Sanyo North America, Inc. A/K/A Sanyo North America Group ("Sanyo") was a corporation having its principal place of business at 218 State Route 17 North, Rochelle Park, New Jersey 07662. At all times relevant herein, Sanyo, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business nationally and internationally.

18. At all times relevant to this Complaint, defendant Sony Electronics, Inc. ("Sony") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at The Corporation Trust Incorporated, 300 East Lombard Street, Baltimore, Maryland 21202. At all times relevant herein, Sony, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business nationally and internationally.

19. At all times relevant to this Complaint, defendant AT&T Corp., A/K/A AT&T, ("AT&T") was a corporation organized and existing under the laws of the State of New York, having its principal place of business at 195 Broadway, New York, New York. At all times relevant herein, AT&T, through its agents, distributors, servants and/or employees engaged in the sale and/or promotion of

WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas

20. At all times relevant to this Complaint, defendant Verizon Communications, Inc. formerly known as Bell Atlantic Corporation, ("Verizon") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 1 East Pratt Street, Constellation Plaza, Baltimore, Maryland 21202. At all times relevant herein, Verizon Communications, through its agents, servants, distributes, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

21. At all times relevant to this Complaint, defendant Verizon Wireless, A/K/A Bell Atlantic Nynex, A/K/A Nynex, A/K/A Bell Atlantic Mobile, Inc., formerly known as Bell Atlantic Nynex Mobile, Inc. ("Verizon Wireless") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 180 Washington Valley Road, Bedminster, New Jersey 07921. At all times relevant here, Verizon Wireless, through its affiliate corporations, companies and partnerships, agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

22. At all times relevant to this Complaint, defendant Cellco Partnership; d/b/a Verizon Wireless, formerly d/b/a Bell Atlantic Mobile, formerly d/b/a Bell Atlantic NYNEX Mobile ("Cellco"), was a partnership organized and existing under the laws of the State of Delaware having its principal place of business at 180 Washington Valley Road, Bedminster, New Jersey, 07921. At all times relevant herein, Cellco, through its agents,

servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

23. At all times relevant to this Complaint, defendant Cingular Wireless LLC formerly known as Southwestern Bell Mobile Systems, Inc. A/K/A Southwestern Bell Wireless ("Cingular"), was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. At all times relevant herein, Cingular, through its agents, servants, distributors, and/or employers engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

24. At all times relevant to this Complaint, defendant SBC Communications Inc. ("SBC"), was a corporation and existing under the laws of the State of Delaware having its principal place of business at 175 East Houston Street, San Antonio, Texas 78205. At all times relevant herein, SBC was conducting its business through its affiliate corporations, companies, and partnerships, and its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPS, cellular telephone equipment and transmission services throughout its service areas.

25. At all times relevant to this Complaint, defendant Cellular One Group, A/K/A Cellular One ("Cellular One"), was a partnership organized and existing under the laws of the State of Delaware having its principal place of business at 5001 Lyndon B Johnson Freeway, Suite 700, Dallas, Texas 75244. At all times relevant herein, Cellular One, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission

services to cellular telephone owners and users throughout its service areas.

26. At all times relevant to this Complaint, defendant VoiceStream Wireless Corporation, A/K/A VoiceStream Wireless ("VoiceStream"), was a partnership organized and existing under the laws of the State of Delaware having its principal place of business at 3650 131st Avenue SE, Suite 200, Bellvue, Washington, 98006. At all times relevant herein, VoiceStream, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

27. At all times relevant to this. Complaint, defendant Comcast/Metrophone ("Comcast") has its corporate offices and principal place of business located at 1234 Market Street, Philadelphia, Pennsylvania. At all times relevant herein, Comcast/Metrophone was engaged in the business of owning, promoting, marketing, distributing and operating the wireless network necessary for use of the WHHPs herein.

28. Defendants John Does 1 through [illegible] are as yet unidentified defendants who at all times relevant hereto were engaged in the business of manufacturing, selling, promoting, marketing and distributing the WHHPs herein.

29. Defendants John Does 51 through 100 are as yet unnamed defendants who at all times relevant hereto were engaged in the business of owning, selling, promoting, marketing, distributing and operating the wireless networks necessary for the use and operation of the WHHPs herein.

30. On information and belief, all defendants conduct business in Pennsylvania and in Philadelphia County.

III. CLASS ALLEGATIONS

31. The class consists of:

a. all persons in; the Commonwealth of Pennsylvania who purchased or leased WHHPs who have not been diagnosed with a brain-related tumor or cancer of the eye; and

b. all future purchasers and lessees of WHHPs who have not been diagnosed with a brain-related tumor or cancer of the eye

(collectively, the "Class")

32. Plaintiff is a member of the Class.

33. It is estimated that the Class consists of hundreds of thousands, if not millions, of persons throughout the Commonwealth of Pennsylvania and is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable. The exact number of Class members is presently unknown to plaintiff.

34. There are questions of law or fact common to the members of the Class which predominate over any questions affecting only individual members and which make class certification appropriate in this case, including:

a. whether defendants, acting individually or collectively, failed to conduct appropriate, reasonable and adequate testing of WHHPs' to determine the association between RFR and biological effects and the risk to human health arising therefrom;

b. whether the defendants, acting individually or collectively, failed to conduct appropriate, reasonable and adequate research and studies to determine the association between RFR and the biological effects and the health risk:

c. whether the defendants, acting individually or collectively, failed to warn or otherwise inform plaintiff and other members of the Class of the association between RFR and biological effects and the risks to human health arising therefrom;

d. whether the defendants, acting individually or collectively, failed to provide headsets or other devices which would have eliminated, reduced or minimized the biological effects from RFR and the risk to human health raising therefrom;

e. whether defendants falsely and deceptively misrepresented, omitted to adequately disclose and/or affirmatively concealed in their advertisements, promotional materials and other materials, among other things, the potential hazards associated w..h the use of WHHPs;

f. whether the defendants made express or implied, direct or indirect, misrepresentations of fact or omitted and concealed material facts about the WHHPs; and

g. whether the defendants' conduct violated the Pennsylvania Unfair and Deceptive Trade Practices Act, 73 Pa. C.S.A § 201-1 et seq., and other provisions of Pennsylvania statutory and common law.

35. The claims asserted by the named plaintiff are typical of the claims of the members of the Class.

36. This class action satisfies the criteria set forth in Pa R. Civ. P. 1709 in that plaintiff is a member of the Class; plaintiff will fairly and adequately protect the interests of the members of the Class; his interests are coincident with and not antagonistic to, those of the Class; he has retained attorneys experienced in class and complex litigation as his counsel; and he has, or through his counsel, has access to, adequate financial resources to assure that the interests of the Class are protected.

37. A class action is superior to other available methods for the fair and efficient adjudication of this controversy for at least the following reasons:

a. It is economically impractical for most members of the Class to prosecute separate, individual actions; and

b. After the liability of the defendants has been adjudicated, the individual and aggregate claims of all

members of the Class can be determined by the Court.

38. Litigation of separate actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to the individual Class members which would substantially impair or impede the ability of other Class members to protect their interests.

39. Class certification is also appropriate because defendants have acted or refused on ground generally applicable to the Class, thereby making appropriate declaratory and/or injunctive relief with respect to the claims of, plaintiff and the Class members.

IV. FACTUAL BACKGROUND

40. WHHPs are sold in the United States and throughout the world. More than 100 million Americans use WHHPs and aver 400 million have been sold internationally.

41. Service providers are an integral component of the WHHP industry, without which WHHPs could not be used. Such providers (hereinafter referred to as "Cell Phone Carriers") are granted licenses by the Federal Communication Commission ("FCC") to broadcast wireless signals on specific frequency bands to provide cellular telephone service to consumers.

42. Each cell phone manufacturer designs and manufactures its WHHPs to fit the specifications of the Cell Phone Carriers.

43. Each Cell Phone Carrier provides manufacturers and/or sellers of WHHPs with specifications based on its specific frequency band. The specifications for the battery and circuitry for all WHHPs in a Cell Phone Carrier's network are determined by the Cell Phone Carrier's license and frequency granted by the FCC.

44. Each time a WHHP user makes or receives a call, a wireless signal is transmitted from the WHHP antenna to the nearest cell tower or from the nearest cell tower to the

WHHP antenna, respectively, thereby exposing the WHHP user to RFR.

45. Land lines also play a central role in the operation and use of WHHPs. Based upon the license granted by the FCC to and the frequency specifications provided to sellers and/or manufacturers of WHHPs, the defendant Cell Phone Carriers create a network by which the wireless signal is transferred to land lines and the call is sent to a receiver or sent to the cell phone customer.

46. The WHHPs purchased by plaintiff, as alleged in paragraph 5 above, was sold without a hands free earpiece or headset ("headset").

47. While placing calls and while receiving calls, plaintiff held the phone in the manner for which it was designed and intended to be used by defendants, so that the receiver was resting against the plaintiff's ear (the "customary position"), the same manner in which other similarly situated Class members customarily use and have used the WHHPs.

48. Each time plaintiff used the WHHP the customary position, the antenna was located next to plaintiff's head.

49. Each time plaintiff used the WHHP, he was exposed to RFR which emanated from the antenna, thereby subjecting plaintiff to RFR and, in the absence of a headset, to RFR's biological effects and the risks to human health arising therefrom.

50. The health risks created by the plaintiff's use of the WHHP is identical to the risks to which all other Class members were exposed.

51. Appropriately designed headsets when properly used eliminate the WHHP user's exposure to RFR. Headsets used in conjunction with WHHPs have been commercially available at all relevant times. Indeed, at all relevant times, defendants marketed headsets as an accessory at an additional cost.

V. HISTORY OF MEDICAL AND SCIENTIFIC RESEARCH

52. Scientific and medical research, published in peer reviewed literature, has demonstrated biological injury from exposure to RFR within the radio frequency band of 300 megahertz to 2.4 gigahertz.

53. Defendants were aware or should have been aware of numerous studies and experiments that demonstrated the health risks and biological effects of RFR dating back to the late 1920s.

54. As research and studies, including animal research, evolved over the ensuing decades, it was found, among other things, that demonstrated physical injury and/or adverse biological effects resulted from exposure to varying levels of RFR.

55. During this same period of time, research was also developed as to the risk to human health posed by exposure to RFR.

56. By the early 1960's, it was well established in the scientific and medical communities that RFR is efficiently absorbed into human tissue and is capable of producing biological injury.

57. It was equally well known in the scientific and medical community by the early 1960's that an antenna is the most efficient means of depositing RFR into the human body and penetrating human tissue, and that the temporal lobe of the brain was the most sensitive area of the body to this type of radiation.

58. Medical and scientific inquiry and research into the harmful biological effects of RFR continued unabated from the 1960's to the present. Throughout this period, dozens of peer reviewed research papers were published which, individually and collectively, raised serious and credible questions regarding whether the RFR to which

WHHP users were and are exposed posed a risk or threat to their health.

59. Throughout this entire period, the defendants, acting individually and collectively through their respective trade associations, acted affirmatively to suppress, discredit and/or minimize this emerging science.

60. Throughout this same period, the defendants, acting individually and collectively through their respective trade associations, took steps to ensure that they would be free to manufacture and mass market WHHPs to the consuming public, free from the constraints of any reasonable and necessary safety standards regulating RFR exposure. They accomplished this by obtaining and exercising dominance and control over the American National Standards Institute ("ANSI") Committee responsible for developing safety standards for RFR emitting devices.

61. In 1966, long before defendants began producing WHHPs, ANSI adopted an RFR exposure limit of 10 m W/cm2, which was identified as ANSI Standard C95.1-1966 ("ANSI-1966"). However, this standard was based solely on the *thermal* effects associated with RFR, and did not contemplate or consider the possibility that RFR exposure could give rise to non thermal biological injury and subsequent adverse health effects. Nevertheless, prior to 1989, the defendants relied upon this irrelevant ANSI Standard to make unfounded and improper representations to the consuming public that WHHPs were safe for their intended use without the use of a headset.

62. In 1989, at an ANSI meeting, representatives of the WHHP industry, including the defendants herein, sought an exclusion for WHHPs from ANSI-1966. The defendants' proposal would have exempted from ANSI-1966 all devices using less than seven (7) watts of power. Such an exclusion would have effectively exempted all WHHPs from ANSI-1966. At this initial meeting, the efforts of the

defendants and others to achieve the exclusion failed, and the vote for the exclusion was defeated.

63. Approximately one month later, a smaller group of the ANSI RFR Safety Standard Committee met and the exclusion clause was again pressed at the urging of the defendants. On this occasion, the proposal was approved, and WHHPs were exempted from ANSI-1966. As a consequence of this action, WHHPs were aggressively marketed thereafter without any safety standard to protect plaintiff and other Class members from the harmful effects of RFR exposure.

64. In the early 1990's, after successfully contriving to exempt themselves from ANSI regulation and as credible concerns continued to surface regarding the safety of WHHPs, the defendants, individually and through their trade associations, undertook with great public fanfare to fund scientific inquiry into the potential health hazards posed by the use of WHHPs. When this industry-funded research failed to corroborate the industry's reckless and premature claims of safety, and, in fact, presented new evidence of potential health concerns, the industry responded by terminating the research funding and publicly disparaging, suppressing and minimizing the results.

65. Despite their knowledge of the literature, research and the industry's own studies, the defendants continued falsely and wrongfully to maintain that WHHPs posed no threat to human health despite mounting abundant evidence to the contrary.

66. At all relevant times, the biological injury caused by low level RFR of WHHPs which, in turn, gives rise to risks to the users' health, was fully known and appreciated by the defendants. At all relevant times, the defendants should have and easily could have minimized, reduced and or eliminated this health risk by acknowledging its existence and providing to each purchaser of WHHPs a hands free earpiece or headset with appropriate instructions

for use. The defendants failed and/or refused to take this simple step to reduce the health risks to consumers for fear that such action would inhibit their ability to mass market WHHPs to the consuming public, including to plaintiff and others members of the Class.

67. On January 26, 1993, defendant Motorola, through one of its senior executives, announced to the news media, which subsequently reported to the public, that "thousands of studies" had shown that cellular phones were "safe." This statement was false and misleading.

68. On July 16, 1993, in furtherance of its dishonest campaign to assure the consuming public of the purported "safety" of WHHPs, the Cellular Telecommunications Industry Association ("CTIA"), representing many of the named defendants, held a press conference and issued a report entitled "Safety Update-Fast Facts: Portable Cell Phone Safety," which, in bold print, falsely and deceptively sated: **"Rest assured. Cellular telephones are safe!"** The report further stated that WHHPs fell within the safety standards of the FCC. However, the defendants fraudulently and deceitfully omitted the fact that the FCC had declared that it does not consider itself the "agency" responsible for evaluating the health effects of RFR and WHHPs.

69. This industry deception prompted Elizabeth Jacobson, Deputy Director for Science at the Center for Devices and Radiological Health of the U.S. Food and Drug Administration ("FDA"), on July 19, 1993 to send a letter to CTIA president Thomas Wheeler, which clearly questioned and challenged the false and misleading statements made by the defendants to the public regarding the "safety" of WHHPs. In pertinent part, that letter stated:

> "I am writing to let you know that we were concerned about two important aspects of your press conference on July 16 concerning the safety of cellular phones, and to ask that

> you carefully consider the following comments when you make future statements to the press.
>
> First, both the written press statements and your verbal comments during the conference seemed to display an unwarranted confidence that these products will be found to be absolutely safe. In fact, the unremittingly upbeat tone of the press packet strongly implies that there can be no hazard, leading the reader to wonder why any further research would be needed at all. (Some readers might also wonder how impartial the research can be when it's stated goal is "a determination to reassure consumers," and when the research sponsors predict in advance that 'we expect the new research to reach the same conclusion, that the cellular phones are safe."). . .
>
> We are even more concerned that your press statements did not accurately characterize the relationship between CTIA and the FDA. . . . [S]ince it is not yet clear whether we will help to direct the research program, it is premature to state that we will credential the research.
>
> To sum up, Mr. Wheeler, our role as a public health agency is to protect health and safety, not to "reassure consumers." I think it is very important that the public understand where we stand in evaluating the possibility that cellular phones might pose a health risk . . .

70. In or about late 1993 or early 1994, the cell phone industry, including the named defendants, through CTIA, organized a committee to prepare a manual for public consumption discussing "responsible" WHHP use. After receiving a draft of the manual, Thomas Wheeler, president

of CTIA, sent a memorandum to the drafting committee expressing his concerns over certain language in the draft which acknowledged and/or implied that the use of WHHPs could pose health risks. Mr. Wheeler's memorandum suggested significant substantive deletions from the draft. The committee thereafter deleted the offending material, set forth below in brackets and bold typeface:

> "Do not operate your transportable cellular telephone when holding the antenna, or when any person is within 4 inches (10 centimeters) of the antenna. **[Otherwise you may impair call quality, may cause your phone to operate at a higher power level than is necessary, and may expose that person to RF energy in excess of the levels established by the updated ANSI Standard.**
>
> **If you want to limit RF exposure even further, you may choose to control the duration of your calls or maintain a distances from the antenna of more than 4 inches (10 centimeters)].**
>
> For best call quality, keep the antenna free from obstructions and point it straight up."

71. Subsequent to, and as a direct consequence of the filing of other proceedings raising concerns about biological injury from RFR, the defendants (or some of them) began to provide to purchasers and lessees of WHHPs with a copy of the FDA's "Update on Mobile Phones" dated October 2000 (the "Update"), The Update is included by some defendants as an insert to the packaging for newly purchased WHHPs.

72. The FDA's "Update" informs the consuming public as follows:

The U.S. Food and Drug Administration's Center for Devices and Radiological Health Consumer Update on Mobile Phones.

...Why the concern?

Mobile phones emit low levels of radio frequency energy (i.e., radio frequency radiation) in the microwave range while being used. They also emit very low levels of radio frequency energy (RF), considered non significant, when in the stand by mode. It is well known that high levels of RF can produce biological damage through heating effects (this is how your microwave oven is able to cook food). *However, it is not known whether, to what extent, or through what mechanism, lower levels of RF might cause adverse health effects as well. Although some research has been done to address these questions, no clear picture of the biological effects of this type of radiation has emerged to date. Thus, the available science does not allow us to conclude that mobile phones are absolutely safe, or that they are unsafe...* (Emphasis added).

How much evidence is there that hand held mobile phones might be harmful?

Briefly, there is not enough evidence to know for sure, either way; however, research efforts are on going. The existing scientific evidence is conflicting and many of the studies that have been done to date have suffered from flaws in their research methods.

...What is FDA's role concerning the safety

of mobile phones?

Under the law, FDA does not review the safety of radiation emitting consumer products such as mobile phones before marketing, as it does with new drugs or medical devices...

Although the existing scientific data do not justify FDA regulatory actions at this time, FDA has urged the mobile phone industry to take a number of steps to assure public safety. The agency has recommended that the industry:

- support needed research into possible biological effects of RF of the type emitted by mobile phones;
- design mobile phones in a way that minimizes any RF exposure to the user that is not necessary for device function; and
- cooperate in providing mobile phone users with the best possible information on what is known about possible effects of mobile phone use on human health.

73. In addition to furnishing this FDA Update as a package insert, some defendants also began including headsets as part of the package of newly purchased WHHPs.

VI. DEFENDANTS' MISCONDUCT

74. At all relevant times, plaintiff and other members of the Class were and continue to be misinformed, misled and deceived by the defendants to the effect that WHHPs are safe and pose no threat to human health.

75. At all relevant times, defendants controlled

the design, assembly, platform for usage, manufacture, marketing and sales of WHHPs, which were widely advertised by the defendants as posing no threat to human health.

76. The product warnings in effect during the period relevant to this Complaint were both substantively and graphically wholly inadequate to alert plaintiff and the Class as to the risks associated with WHHP use.

77. Defendants have never adequately informed the public about the risks of biological injury which poses a health risk to WHHP users, or of the fact that the risk of injury can differ with the amount of use and the sensitivity of the user.

78. The defendants knew or, by the application of reasonable, developed human skill and foresight, should have known of the unreasonably dangerous characteristics of WHHPs because such knowledge was, at all times relevant to the claims herein, part of the "state of the art" body of knowledge in the relevant scientific and medical communities.

79. At all times relevant to the claims herein, defendants failed to conduct adequate testing and research regarding the dangerous characteristics of WHHPs. Not only did the defendants fail to engage in pre-market testing of WHHPs, but after introducing WHHPs into the marketplace, defendants continued to fail to fulfill their ongoing obligation to conduct adequate testing and research regarding the dangerous characteristics of WHHPs.

COUNT I

(Violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S.§ 201-1 *et seq.*)

80. Paragraphs 1 through 79 are herein incorporated by reference as though the same were set forth

below at length.

81. Plaintiff, on behalf of himself and other members of the Class, brings this Count pursuant to Pennsylvania's Unfair Trade Practices and Consumer Protection Law (the "Act"), 73 P.S. § 201-1 et seq., in that he purchased the WHPPs primarily for his personal use and thereby suffered ascertainable loss as the result of defendants' actions, in violation of the Act.

82. Pennsylvania enacted the Act to protect consumers from unfair, deceptive and/or fraudulent business practices, and from unfair competition and false advertising. The Act provides consumers with a private right of action.

83. The Act defines "unfair methods of competition and unfair or deceptive acts or practices" and declares them unlawful in 73 P.S. § 201-2(4)(i)-(xxi). Conduct prohibited by the Act includes the following without limitation:

(v) representing that goods have characteristics, ingredients, uses, benefits or qualities that they do not have;

(vii) representing goods are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are not;

(ix) advertising goods or services with intent not to sell them as advertised; and

(xxi) engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.

84. Defendants violated these subsections of the Act by their use of false and misleading misrepresentations or omissions of material fact in connection with their manufacture, distribution and sale of WHHPs and the mobile networks necessary for their operation. Defendants uniformly communicated the purported benefits of WHHPs, while failing to adequately disclose and omitting and concealing the potential serious and dangerous risks associated with use of the WHHPs. Further, there is a

presumption of classwide reliance upon defendants' representations because the defects were not of the type which consumers, including plaintiff and the Class, could discover on their own about the biological injury, health risks and biological effects of the use of WHHPs.

85. By the omission and concealment of the material facts alleged above, the defendants deceived and continue to deceive consumers. This conduct constitutes unlawful, unfair, deceptive and/or fraudulent business practices within the meaning of the Act.

86. Defendants violated 73 P.S. §201-2(4)(v), (vii), (ix) and (xxi) by misleadingly, falsely and/or deceptively misrepresenting and/or omitting material facts regarding, among other things, the utility, benefits, costs, safety and efficacy and advantages of the WHHPs, as described above.

87. As a result of violating the Act, and pursuant to §201-9.2(a), defendants are liable to plaintiff and the Class for actual damages, or $100 for each unlawful transaction, whichever is greater, and to plaintiff and the Class for costs and reasonable attorneys' fees and court costs, and for the trebling of damages awarded, and exemplary or punitive damages.

WHEREFORE, plaintiff respectfully requests that the Court grant the following relief:

a. enter an order pursuant to Rule 1710 of the Pennsylvania Rules of Civil Procedure permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing plaintiff as the representative of the Class, and plaintiffs' counsel as counsel for the Class;

b. enter judgment in favor of plaintiff and the Class against defendants, jointly and severally, and/or as may be apportioned by the Court or finder of fact, for actual damages of the plaintiff and the Class and for all other relief, in an amount to be proved at trial, including, but not limited to, the costs of purchasing headsets for the WHHPs

(including reimbursing Class members who already have purchased headsets) and any other costs and expenses, with minimum damages of $100 per Class member, together with treble damages, interest, attorneys' fees, expert fees and the costs of suit;

c. providing each Class member who has not been so provided, a WHHP which can be used with a headset;

d. enter declaratory and injunctive relief against defendants, requiring written instructions for the use of the headsets, including an explanation of the reasons why the headsets should be used; and

e. award such further relief as provided for, under and pursuant to the Act, 73 Pa. C.S. §201-9.2(a), and as this Court deems necessary, just and proper.

COUNT II
(BREACH OF IMPLIED WARRANTY)

88. Paragraphs 1 through 87 are incorporated herein by reference as though the same were fully set forth below at length.

89. Under Pennsylvania common and statutory law, a warranty of merchantability and a warranty of fitness for particular purpose are implied in all sales transactions where the seller has reason to know the particular purpose for which the product is to be used and that the consuming public is relying on the skill or judgment of the seller to furnish a suitable product. A warranty of merchantability is a warranty implied by law that a product is fit for the ordinary purposes for which it is used, is properly labeled and conforms to the. representations made about it. See 13 P.S. § 2314. A warranty of fitness for a particular purpose is a warranty implied by law that a product is fit for its intended use. See 13 P.S. § 2315.

90. Defendants' WHHPs, in conjunction with the

mobile networks necessary for use of the WHHPs, were subject to both an implied warranty of merchantability and an implied warranty of fitness for a particular purpose.

91. Defendants breached said warranties in the manner described above.

92. Plaintiff and the Class have been damaged by defendants' breaches of warranties in the manner described above.

WHEREFORE, plaintiff respectfully requests that the Court grant the following relief:

a. enter an order pursuant to Rule 1710 of the Pennsylvania Rules of Civil Procedure permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing plaintiff as the representative of the Class, and plaintiff's counsel as counsel for the Class;

b. enter judgment in favor of plaintiff and the Class against defendants, jointly and severally, and/or as may be apportioned by the Court or finder of fact, for compensatory damages consisting, among other things, of the costs of headsets, as well as interest, attorneys' fees, expert fees and costs of suit;

c. providing each Class member who has not been so provided, a WHHP which can be used with a headset;

d. enter declaratory and injunctive relief against defendants, requiring written instructions for the use of the headsets, including an explanation of the reasons why the headsets should be used; and

e. award such further relief as the Court deems just and proper.

COUNT III
(FRAUDULENT CONCEALMENT)

93. Paragraphs 1 through 92 are incorporated herein by reference as though the same were fully set forth

below at length.

94. Under Pennsylvania common law, one party to a transaction, who by concealment or other action, intentionally prevents the other party to that transaction from acquiring material information, is subject to the same liability to the other party for pecuniary loss as though he or she had affirmatively represented the non existence of the information that the other was thus prevented from discovering. See Restatement (2d) of Torts, § 550.

95. Defendants, by their concealment and other fraudulent actions described above, intentionally prevented the plaintiff and other members of the Class from acquiring material information concerning the dangers and hazards associated with WHHPs and the mobile networks necessary for their use.

96. Plaintiff and the Class have been damaged by defendants' fraudulent concealment.

97. Defendants are subject to the same liability to plaintiff and the members of the Class for the damages and other relief as a result of defendants' concealment as though defendants had affirmatively stated that there were no risks or hazards associated with use of the WHHPs, thus preventing plaintiff and the Class from discovering the hazards and risks.

WHEREFORE, plaintiff respectfully requests that the Court grant the following relief.

a. enter an order pursuant to Rule 1710 of the Pennsylvania Rules of Civil Procedure permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing plaintiff as the representative of the Class, and plaintiff's counsel as counsel for the Class;

b. enter judgment in favor of the plaintiff and the Class against defendants, jointly and severally, and/or as may be apportioned by the Court or finder of fact, for compensatory damages consisting, among other things, of the costs of headsets, as well as interest, attorneys' fees,

expert fees and costs of suit;

c. providing each Class member who has not been so provided, a WHHP which can be used with a headset;

d. enter declaratory and injunctive relief against defendants, requiring written instructions for the use of the headset, including an explanation of the reasons why the headsets should be used; and

e. award such further relief as the Court deems just and proper.

COUNT IV
(STRICT LIABILITY FAILURE TO WARN)

98. Paragraphs 1 through 97 are incorporated herein by reference as though the same were fully set forth below at length.

99. The WHHPs purchased by the plaintiff and the Class were placed in the stream of commerce and sold by the defendants in a defective and unreasonably dangerous condition in that the WHHPs failed to include proper warnings regarding all possible adverse health effects associated with the use of WHHPs and the harmful effects of the radiation emitted from the WHHPs to plaintiff and the Class.

100. The WHHPs manufactured and/or supplied by the defendants reached the plaintiff and other members of the Class without any substantial change in their condition and were in that same condition when used by plaintiff and the Class.

101. Defendants also failed to warn plaintiff and other members of the Class that other methods for using WHHPs were available, such as, but not limited to, a headset and/or other protective devices, which would have prevented the adverse health effects associated with the use of WHHPs.

102. The WHHPs purchased by the plaintiff and

other members of the Class were both defective and unreasonably dangerous due to inadequate warnings or instructions because, after defendants knew or should have known of the risks from their use, defendants failed to provide adequate warnings or instructions to consumers as herein alleged. Defendants continued to aggressively promote the WHHPs and failed to provide a protective device including, but not limited to, a headset.

103. The failure to provide adequate warnings or instructions as herein alleged or to provide a protective device including, but not limited to, a headset, made the WHHPs unreasonably dangerous.

104. The product warnings in effect during the period relevant to this Complaint were both substantively and graphically wholly inadequate to alert plaintiff and the Class as to the risks associated with WHHP use.

105. Defendants have never adequately informed the public about the risks of biological injury which poses a health risk to WHHP users, or of the fact that the risk of injury can differ with the amount of use and the sensitivity of the user.

106. As a direct and proximate result of the defective and unreasonably dangerous condition of the WHHPs as alleged above, plaintiff, and other members of the Class were and continue to be exposed to health risks.

107. At all times relevant hereto, defendants actually knew of the defective nature of their products as herein set forth and continued to design, manufacture, market, sell and provide service for their products so as to maximize sales and profits at the expense of public health and safety. At all relevant times, defendants could have eliminated or significantly mitigated the risks alleged herein by acknowledging their existence and providing purchasers such as the plaintiff and the Class with a headset with appropriate warnings and instructions for use. Defendants' abject refusal or failure to so act was motivated solely by

their desire to maximize sales and profits at the expense of the users' health.

WHEREFORE, plaintiff respectfully requests that the Court grant the following relief:

a. enter an order pursuant to Rule 1710 of the Pennsylvania Rules of Civil Procedure permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing plaintiff as the representative of the class, and plaintiff's counsel as counsel for the class;

b. enter judgment in favor of plaintiff and the class against defendants, jointly and severally, and/or as may be apportioned by the Court or finder of fact, for compensatory damages consisting, among other things, of the costs of a headset, as well as interest, attorneys' fees, expert fees and costs of suit;

c. providing each Class member who has not been so provided, a WHHP which can be used with a headset;

d. enter declaratory and injunctive relief against defendants, requiring written instructions for the use of the headset, including an explanation of the reasons why the headsets should be used; and

e. award such further relief as the Court deems just and proper.

COUNT V
(STRICT LIABILITY - DESIGN OR MANUFACTURING DEFECT)

108. Paragraphs 1 through 107 are incorporated herein by reference as though the same were fully set forth below at length.

109. The WHHPs designed, manufactured and/or supplied by the defendants were placed in the stream of commerce in a defective and/or in an unreasonably dangerous condition in that defendants failed to incorporate

adequate equipment, instructions, and/or warnings to protect plaintiff and other members of the Class from the health risks created by WHHPs and biological injury caused by same.

110. The WHHPs manufactured and/or supplied by the defendants were defective in design and/or manufacture because, when they were placed in the stream of commerce, they failed to contain or incorporate a headset or other protective device to eliminate or reduce the users' exposure to RFR.

111. The WHHPs reached plaintiff and other members of the Class without substantial change in their condition and were in that same condition at the time of the use alleged.

112. The design or manufacturing defect alleged herein rendered the WHHPs manufactured or supplied by the defendants unreasonably dangerous when used in the manner intended by the defendants and, as a result, defendants are strictly liable to plaintiff and the other Class members.

113. At the time that the WHHPs left the defendants' possession, the WHHPs were unreasonably dangerous to the plaintiff and other Class members and the defendants had safe alternatives or modifications which were economically feasible.

114. As a direct and proximate result of the defective and unreasonably dangerous condition of WHHPs as manufactured and/or supplied by defendants, plaintiff and other Class members were exposed to health risks described herein.

115. At all times relevant hereto, the defendants actually knew of the defective nature of their products as herein set forth and continued to design, manufacture, market, sell and provide service for their products so as to maximize sales and profits at the expense of public health and safety. At all relevant times, defendants could have eliminated or significantly mitigated the health risks alleged

herein by acknowledging their existence and providing purchasers such as plaintiff and the Class with a headset with appropriate warnings and instructions for use. Defendants' abject refusal or failure to so act was motivated solely by their desire to maximize sales and profits at the expense of the users' health.

WHEREFORE, plaintiff respectfully requests that the Court grant the following relief:

a. enter an order pursuant to Rule 1710 of the Pennsylvania Rules of Civil Procedure permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing plaintiff as the representative of the Class, and plaintiff's counsel as counsel for the Class;

b. enter judgment in favor of plaintiff and the Class against defendants, jointly and severally, and/or as may be apportioned by the Court or finder of fact, for compensatory damages consisting, among other things, of the costs of headsets, as well as interest, attorneys' fees, expert fees and costs of suit;

c. providing each Class members who has not been so provided, a WHHP which can be used with a headset;

d. enter declaratory and injunctive relief against defendants, requiring written instructions for the use of the headset, including an explanation of the reasons why the headsets should be used; and

e. award such further relief as the Court deems just and proper.

COUNT VI
(DECLARATORY RELIEF)

116. Paragraphs 1 through 116 are incorporated herein by reference as though the same were fully set forth below at length.

117. This claim is asserted on behalf of plaintiffs

and the Class in accordance with the Pennsylvania Declaratory Judgments Act, 42 Pa. C.S.A. § 7531 *et seq.*, and Rules 1601 *et seq.* of the Pennsylvania Rules of Civil Procedure.

118. Plaintiff and the Class are entitled to a declaration that defendants' conduct described herein constitutes violations of applicable Pennsylvania statutory and common law. The declaratory relief requested is an order declaring defendants' conduct, as alleged herein, to be unlawful, and requiring defendants to supply WHHP users with headsets for the WHHPs currently in use (and, if necessary, a new WHHP) and headsets for all WHHPs sold in the future, together with appropriate instructions as alleged herein.

WHEREFORE, plaintiff respectfully request that the Court grant the following relief:

a. enter an order pursuant to Rule 1701 of the Pennsylvania Rules of Civil Procedure permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing plaintiffs as the representative of the Class, and plaintiff's counsel as counsel for the class;

b. enter an order requiring defendants to furnish plaintiff and the Class with a headset and appropriate instructions;

c. award plaintiff and the Class his attorneys' fees, litigation expenses and costs; and

d. award such other and further relief as the Court deems just and proper.

COUNT VII
(PUNITIVE DAMAGES)

119. Paragraphs 1 through 118 are incorporated herein by reference as though the same were fully set forth at length.

120. Defendants' conduct was wanton, willful and

so egregious as to warrant the award or exemplary or punitive damages.

WHEREFORE, plaintiff respectfully requests that the Court. enter an order awarding plaintiff and the Class punitive or exemplary damages, together with attorneys' fees, litigation expenses and the costs of suit.

JURY DEMAND

Plaintiff demands a trial by jury on all Counts so triable.

Dated. April 19, 2001

LAW OFFICES OF KENNETH A. JACOBSEN

s/Kenneth A. Jacobsen
Kenneth A. Jacobsen
ID No. 31208
Nancy B. Grogan
ID. No. 49483
22 West Front Street
Media, PA 19063
(610)566-7930

LAW OFFICES OF PETER G. ANGELOS
The John Wanamaker Building
100 Penn Square East
Suite 1050, 10th Floor
Philadelphia, PA 19107
(215) 963-9333
Joseph A. O'Keefe

O'KEEFE & SHER, P.C.
I.D. No. 77068

15019 Kutztown Road
Kutztown, PA
(610) 683-0771

LOWE, STEIN, HOFFMAN, ALL WEISS & HAUVER, L.L.P.
701 Poydras Street
One Shell Square, Suite 3600
New Orleans, LA 70139
(504) 581-2450

VERIFICATION

I, Francis J. Farina, hereby verify that the facts set forth in the foregoing Class Action Complaint are true and correct to the best of my knowledge, information and belief. This verification is made subject to the penalties of 18 Pa C.S.A. §4904 relating to unsworn falsification to authorities.

Dated: April 17, 2001

s/Francis J. Farina
Francis J. Farina

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

LAW OFFICES OF PETER G. ANGELOS
Steven Thaler
115 Broadway, 3rd Floor
New York, NY 10006
(212) 962-0048

LOWE, STEIN, HOFFMAN,
ALLWEISS & HAUVER, LLP.
701 Poydras Street
One Shell Square, Suite 3600
New Orleans, LA 70139

LAW OFFICES OF
KENNETH A. JACOBSEN
22 West Front Street
Media, PA 19063
(610) 566-7930

Attorneys for Plaintiffs

Crystall Gillian
1726 Davidson Avenue
Apartment 5A
Bronx, NY 10453
and
Dimitri Mack
5210 Broadway
Apartment 86
Bronx, NY 10463
Plaintiffs,

v.

NOKIA INC.
6000 Connection Drive
Irving, TX 75039
and
NEC AMERICA
8 Old Sod Farm Road
Melville, NY 11747
and
ERICSSON WIRELESS COMM., INC.
740 East Campbell Road
Richardson, Texas 75081
and
MOTOROLA, INC.
5725 E. River Road
Chicago, Illinois 60631
and
SPRINT PCS LIMITED PARTNERSHIP
A/K/A Sprint Spectrum
A/K/A Sprint
4900 Main Street, 12th Floor
Kansas City, Missouri 64112
and
AUDIOVOX COMMUNICATIONS CORPORATION
A/K/A Audiovox Corporation
150 Marcus Boulevard
Hauppauge, New York 11788
and
NEXTEL COMMUNICATIONS, INC.
A/K/A Nextel
A/K/A Nextel Communications of the
Mid Atlantic, Inc.
A/K/A Nextel Partners, Inc.
2001 Edmund Halley Drive
Reston, Virginia 20191

and

MATSUSHITA CORPORATION OF AMERICA
A/K/A Panasonic Corporation
9401 West Grand Avenue
Franklin Park, Illinois 60131

and

PHILIPS ELECTRONIC NORTH AMERICA CORP.
100 East 42nd Street
New York, NY 10017

and

QUALCOMM INCORPORATED
A/K/A Qualcomm, Inc.
6455 Lusk Boulevard
San Diego, California 92121

and

SAMSUNG ELECTRONICS AMERICA, INC.
A/K/A Samsung Electronics
105 Challenger Road
Ridgefield Park, NJ 07660

and

SANYO NORTH AMERICA, INC.
A/K/A Sanyo North America Group
218 State Route 17 North
Rochelle Park, New Jersey 07662

and

SONY ELECTRONICS, INC.
The Corporation Trust Incorporated
300 East Lombard Street
Baltimore, Maryland 21202

and

AT&T CORP.
A/K/A AT&T
195 Broadway

New York, New York
and
VERIZON COMMUNICATIONS, INC.
Formerly Known As:
Bell Atlantic Corporation
1 East Pratt Street
Constellation Plaza
Baltimore, MD 21202
and
VERIZON WIRELESS
A/K/A Bell Atlantic Nynex
A/K/A Nynex
A/K/A Bell Atlantic Mobile, Inc.
Formerly Known As:
Bell Atlantic Nynex Mobile, Inc.
180 Washington Valley Road
Bedminster, New Jersey 07921
and
CELLCO PARTNERSHIP
d/b/a Verizon Wireless
formerly d/b/a Bell Atlantic Mobile
formerly d/b/a Bell Atlantic NYNEX Mobile
180 Washington Valley Road
Bedminster, New Jersey 07921
and
CINGULAR WIRELESS LLC
Formerly Known As:
Southwestern Bell Mobile Systems, Inc.
A/K/A Southwestern Bell Wireless
2711 Centerville Road, Suite 400
Wilmington, DE 19808
and
SBC COMMUNICATIONS INC.
175 East Houston Street
San Antonio, Texas 78205
and

CELLULAR ONE GROUP
A/K/A Cellular One
5001 Lyndon B. Johnson Freeway
Suite 700
Dallas, Texas 75244
and
VOICESTREAM WIRELESS CORPORATION
A/K/A VoiceStream Wireless
3650 131st Avenue SE, Suite 200
Bellvue, Washington 98006
and
COMCAST/METROPHONE
1234 Market Street
Philadelphia, PA 19090
and
JOHN DOES NOS. 1-100

Defendants.

Index No. 15692-2001

VERIFIED COMPLAINT
CLASS ACTION

CLASS ACTION COMPLAINT

Plaintiffs Crystall Gillian and Dimitri Mack bring this class action pursuant to F.R.C.P. 23 and NY CPLR § 901 individually and on behalf all others similarly situated, and alleges the following:

I. INTRODUCTION

1. This class action seeks damages and declaratory and injunctive relief on behalf plaintiff and a class of persons who purchased or leased wireless handheld telephones

("WHHPs").

2. Through a common and uniform course of conduct, the defendants have manufactured, supplied, promoted, sold, leased and provided wireless service for WHHPs when they knew or should have known that their products generate and emit radio frequency radiation ("RFR") that causes an adverse cellular reaction and/or cellular dysfunction ("biological injury") through its adverse health effects on: calcium and ion distribution across the cell membrane; melatonin production; neurological function; DNA single and double strand breaks and chromosome damage; enzyme activities; cell stress and gene transcription; and the permeability of the blood brain barrier (hereinafter collectively described as "the health risk" and/or "the biological effects").

3. Through a common and uniform course of conduct, the defendants, acting individually and collectively, failed to adequately disclose to the consuming public the fact that WHHPs emit RFR that causes biological injury and a risk to the users' health.

4. The purpose of this action is to hold accountable and to obtain maximum legal and equitable relief from those corporations and entities that are responsible for producing and placing into the stream of commerce WHHPs which create a health risk to users by causing biological injury.

II. THE PARTIES

5. Plaintiff Crystall Gillian is an adult individual who resides at 1726 Davidson Avenue, Apartment 5A, Bronx, New York 10453. On or about February 2000 and February 2001, plaintiff purchased WHHPs from defendant Motorola.

6. Plaintiff Dimitri is an adult individual who resides at 5210 Broadway, Apartment 86, Bronx, New York 10463. Plaintiff purchased a WHHP from defendant Sanyo.

Plaintiff separately purchased an earpiece for use with the WHHP, for which he paid an out of pocket sum separate from the price he paid for the WHHP.

7. At all times relevant to this Complaint, defendant NOKIA, Inc. a/k/a Nokia Mobile Phones, Inc. ("Nokia") was a Delaware corporation with its principal place of business at 6000 Connection Drive, Irving, Texas 75039. At all times relevant herein, Nokia, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

8. At all times relevant to this Complaint, defendant NEC America, Inc. ("NEC") was a corporation organized and existing under the laws of the State of New York, with its principal place of business at 8 Old Sod Farm Road, Melville, New York 11747. At all times relevant herein, NEC, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

9. At all times relevant to this Complaint, defendant Ericsson Wireless Communications, INC. a/k/a Ericsson, Inc. ("Ericsson") was a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 740 East Campbell Road, Richardson, Texas 75081. At all times relevant herein, Ericsson, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

10. At all times relevant to this Complaint, defendant Motorola, Inc. ("Motorola") was a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 5725 E. River Road, Chicago, Illinois 60631. At all times relevant herein, Motorola, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

11. At all times relevant to this Complaint, defendant Sprint PCS Limited Partnership, A/K/A Sprint Spectrum, A/K/A Sprint, formerly known as, Bell Atlantic-Maryland, Inc. ("Sprint") was a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 4900 Main Street, 12th Floor, Kansas City, Missouri 64112. At all times relevant herein, Sprint, through its agents, distributors, servants and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

12. At all times relevant to this Complaint, defendant Audiovox Communications Corporat on A/K/A Audiovox Corporation ("Audiovox") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business in the State of New York at 150 Marcus Blvd, Hauppauge, New York 11788. At all times relevant herein, Audiovox, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

13. At all times relevant to this Complaint, d-fendant Nextel Communications, Inc., A/K/A Nextel, A/K/A Nextel Communications of the Mid-Atlantic, Inc., A/K/A Nextel Partners, Inc. ("Nextel") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 2001 Edmund Halley Drive, Reston, Virginia 20191. At all times relevant herein, Nextel, through its agents, distributors, servants and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services, as well as to cellular telephone owners and users throughout its service areas.

14. At all times relevant to this Complaint, defendant Matsushita Corporation of America A/K/A Panasonic Corporation. ("Panasonic") was a corporation organized and

existing under the laws of the State of Delaware having its principal place of business at 9401 West Grand Avenue, Frankin Park, Illinois 60131. At all times relevant herein, Panasonic, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

15. At all times relevant to this Complaint, defendant Philips Electronic North America Corporation ("Philips") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 100 East 42nd Street, New York, New York 10017. At all times relevant herein, Philips, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

16. At all times relevant to this Complaint, defendant Qualcomm Incorporated A/K/A Qualcomm, Inc. ("Qualcomm") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 6455 Lusk Boulevard, San Diego, California, 92121. At all times relevant herein, Qualcomm, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs and WHHP services nationally and internationally.

17. At all times relevant to this Complaint, defendant Samsung Electronics America, Inc. A/K/A Samsung Electronics ("Samsung") was a corporation having its principal place of business at 105 Challenger Road, Ridgefield Park, NJ 07660. At all times relevant herein, Samsung, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs nationally and internationally.

18. At all times relevant to this Complaint, defendant Sanyo North America, Inc. A/K/A Sanyo North America Group ("Sanyo") was a corporation having its principal place of business at 218 State Route 17 North, Rochelle Park, New

Jersey 07662. At all times relevant herein, Sanyo, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business nationally and internationally.

19. At all times relevant to this Complaint, defendant Sony Electronics, Inc.("Sony") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at The Corporation Trust Incorporated, 300 East Lombard Street, Baltimore, Maryland 21202. At all times relevant herein, Sony, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business nationally and internationally.

20. At all times relevant to this Complaint, defendant AT&T Corp., A/K/A AT&T, ("AT&T") was a corporation organized and existing under the laws of the State of New York, having its principal place of business at 195 Broadway, New York, New York. At all times relevant herein, AT&T, through its agents, distributors, servants and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

21. At all times relevant to this Complaint, defendant Verizon Communications, Inc. formerly known as Bell Atlantic Corporation,("Verizon") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 1 East Pratt Street, Constellation Plaza, Baltimore, Maryland 21202. At all times relevant herein, Verizon Communications, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

22. At all times relevant to this Complaint, defendant

Verizon Wireless, A/K/A Bell Atlantic Nynex, A/K/A Nynex, A/K/A Bell Atlantic Mobile, Inc., formerly known as Bell Atlantic Nynex Mobile, Inc. ("Verizon Wireless") was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 180 Washington Valley Road, Bedminister, New Jersey 07921. At all times relevant herein, Verizon Wireless, through its affiliate corporations, companies, and partnerships, agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

23. At all times relevant to this Complaint, defendant Cellco Partnership, d/b/a Verizon Wireless, formerly d/b/a Bell Atlantic Mobile, formerly d/b/a Bell Atlantic NYNEX Mobile ("Cellco"), was a partnership organized and existing under the laws of the State of Delaware having its principal place of business at 180 Washington Valley Road, Bedminster, New Jersey, 07921. At all times relevant herein, Cellco, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

24. At all times relevant to this Complaint, defendant Cingular Wireless LLC formerly known as Southwestern Bell Mobile Systems, Inc. A/K/A Southwestern Bell Wireless ("Cingular"), was a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. At all times relevant herein, Cingular, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

25. At all times relevant to this Complaint, defendant SBC Communications Inc. ("SBC"), was a corporation and existing under the laws of the State of Delaware having its principal place of business at 175 East Houston Street, San Antonio, Texas 78205. At all times relevant herein, SBC was conducting its business through its affiliate corporations, companies, and partnerships, and its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services throughout its service areas.

26. At all times relevant to this Complaint, defendant Cellular One Group, A/K/A Cellular One ("Cellular One"), was a partnership organized and existing under the laws of the State of Delaware having its principal place of business at 5001 Lyndon B Johnson Freeway, Suite 700, Dallas, Texas 75244. At all times relevant herein, Cellular One, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

27. At all times relevant to this Complaint, defendant VoiceStream Wireless Corporation, A/K/A VoiceStream Wireless ("Voicestream"), was a partnership organized and existing under the laws of the State of Delaware having its principal place of business at 3650 131st Avenue SE, Suite 200, Bellvue, Washington, 98006. At all times relevant herein, Voicestream, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services to cellular telephone owners and users throughout its service areas.

28. At all times relevant to this Complaint, defendant Comcast/Metrophone ("Comcast") has its corporate offices and principal place of business located at 1234 Market Street, Philadelphia, Pennsylvania. At all times relevant herein, Comcast/Metrophone was engaged in the business of

owning, promoting, marketing, distributing and operating the wireless network necessary for use of the WHHPs herein.

29. Defendants John Does 1 through 50 are as yet unidentified defendants who at all times relevant hereto were engaged in the business of manufacturing, selling, promoting, marketing and distributing the WHHPs herein.

30. Defendants John Does 51 through 100 are as yet unnamed defendants who at all times relevant hereto were engaged in the business of owning, selling, promoting, marketing, distributing and operating the wireless networks necessary for the use and operation of the WHHPs herein.

31. On information and belief, all defendants conduct business in New York and in the County and Borough of Bronx.

III. CLASS ACTION ALLEGATIONS

32. The class consists of:

(a) all persons in the State of New York who purchased or leased WHHPs who have not been diagnosed with a brain related tumor or cancer of the eye; and

(b) all future purchasers and lessees of WHHPs who have not been diagnosed with a brain related tumor or cancer of the eye;

(collectively, the "Class").

33. Plaintiff is a member of the Class.

34. It is estimated that the Class consists of hundreds of thousands, if not millions, of persons throughout the Commonwealth of Pennsylvania and is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable. The exact number of Class members is presently unknown to plaintiff.

35. There are questions of law or fact common to the members of the Class which predominate over any questions affecting only individual members and which make class certification appropriate in this case, including:

(a) whether defendants, acting individually or collectively, failed to conduct appropriate, reasonable and adequate testing of WHHPs to determine the association between RFR and biological effects and the risk to human health arising therefrom;

(b) whether the defendants, acting individually or collectively, failed to conduct appropriate, reasonable and adequate research and studies to determine the association between RFR and the biological effects and the health risk;

(c) whether the defendants, acting individually or collectively, failed to warn or otherwise inform plaintiff and other members of the Class of the association between RFR and biological effects and the risks to human health arising therefrom;

(d) whether the defendants, acting individually or collectively, failed to provide headsets or other devices which would have eliminated, reduced or minimized the biological effects from RFR and the risk to human health arising therefrom;

(e) whether defendants falsely and deceptively misrepresented, omitted to adequately disclose and/or affirmatively concealed in their advertisements, promotional materials and other materials, among other things, the potential hazards associated with the use of WHHPs;

(f) whether the defendants made express or implied, direct or indirect, misrepresentations of fact or omitted and concealed material facts about the WHHPs; and

(g) whether the defendants' conduct violated the New York Consumer Protection from Deceptive Acts and Practices Act, NY GEN BUS § 349 *et seq.* (hereinafter "the Act"), and other provisions of Pennsylvania statutory and common law.

36. The claims asserted by the named plaintiffs are typical of the claims of the members of the Class.

37. This class action satisfies the criteria set forth in F.R.C.P. 23 and NY CPLR § 901 in that the class is so

numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; plaintiffs' claims are typical of those of the class; plaintiffs are members of the Class; plaintiffs will fairly and adequately protect the interests of the members of the Class; their interests are coincident with and not antagonistic to, those of the Class; they have retained attorneys experienced in class and complex litigation as their counsel; and they have, or through their counsel, have access to, adequate financial resources to assure that the interests of the Class are protected.

38. A class action is superior to other available methods for the fair and efficient adjudication of this controversy for at least the following reasons:

(a) It is economically impractical for most members of the Class to prosecute separate, individual actions; and

(b) After the liability of the defendants has been adjudicated, the individual and aggregate claims of all members of the Class can be determined by the Court.

39. Litigation of separate actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to the individual Class members which would substantially impair or impede the ability of other Class members to protect their interests.

40. Class certification is also appropriate because defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate declaratory and/or injunctive relief with respect to the claims of plaintiffs and the Class members.

IV. FACTUAL BACKGROUND

41. WHHPs are sold in the United States and throughout the world. More than 100 million Americans use WHHPs and over 400 million have been sold internationally.

42. Service providers are an integral component of

the WHHP industry, without which WHHPs could not be used. Such providers (hereinafter referred to as "Cell Phone Carriers") are granted licenses by the Federal Communication Commission ("FCC") to broadcast wireless signals on specific frequency bands to provide cellular telephone service to consumers.

43. Each cell phone manufacturer designs and manufactures its WHHPs to fit the specifications of the Cell Phone Carriers.

44. Each Cell Phone Carrier provides manufacturers and/or sellers of WHHPs with specifications based on its specific frequency band. The specifications for the battery and circuitry for all WHHPs in a Cell Phone Carrier's network are determined by the Cell Phone Carrier's license and frequency granted by the FCC.

45. Each time a WHHP user makes or receives a call, a wireless signal is transmitted from the WHHP antenna to the nearest cell tower or from the nearest cell tower to the WHHP antenna, respectively, thereby exposing the WHHP user to RFR.

46. Land lines also play a central role in the operation and use of WHHPs. Based upon the license granted by the FCC to and the frequency specifications provided to sellers and/or manufacturers of WHHPs, the defendant Cell Phone Carriers create a network by which the wireless signal is transferred to land lines and the call is sent to a receiver or sent to the cell phone customer.

47. The WHHPs purchased by plaintiffs, as alleged in paragraphs 5 and 6 above, were sold without a hands free earpiece or headset ("headset").

48. While placing calls and while receiving calls, plaintiffs held the phone in the manner for which it was designed and intended to be used by defendants, so that the receiver was resting against the plaintiffs' ears (the "customary position"), the same manner in which other similarly situated Class members customarily use and have

used the WHHPs.

49. Each time plaintiffs used the WHHP in the customary position, the antenna was located next to plaintiffs' head.

50. Each time plaintiffs used the WHHP, they were exposed to RFR which emanated from the antenna, thereby subjecting plaintiffs to RFR and, in the absence of a headset, to RFR's biological effects and the risks to human health arising therefrom.

51. The health risks created by the plaintiffs' use of the WHHP are identical to the risks to which all other Class members were exposed.

52. Appropriately designed headsets when properly used eliminate the WHHP user's exposure to RFR. Headsets used in conjunction with WHHPs have been commercially available at all relevant times. Indeed, at all relevant times, defendants marketed headsets as an accessory at an additional cost.

V. HISTORY OF MEDICAL AND SCIENTIFIC RESEARCH

53. Scientific and medical research, published in peer reviewed literature, has demonstrated biological injury from exposure to RFR within the radio frequency band of 300 megahertz to 2.4 gigahertz.

54. Defendants were aware or should have been aware of numerous studies and experiments that demonstrated the health risks and biological effects of RFR dating back to the late 1920s.

55. As research and studies, including animal research, evolved over the ensuing decades, it was found, among other things, that demonstrated physical injury and/or adverse biological effects resulted from exposure to varying levels of RFR.

56. During this same period of time, research was

also developed as to the risk to human health posed by exposure to RFR.

57. By the early 1960's, it was well established in the scientific and medical communities that RFR is efficiently absorbed into human tissue and is capable of producing biological injury.

58. It was equally well known in the scientific and medical community by the early 1960's that an antenna is the most efficient means of depositing RFR into the human body and penetrating human tissue, and that the temporal lobe of the brain was the most sensitive area of the body to this type of radiation.

59. Medical and scientific inquiry and research into the harmful biological effects of RFR continued unabated from the 1960's to the present. Throughout this period, dozens of peer reviewed research papers were published which, individually and collectively, raised serious and credible questions regarding whether the RFR to which WHHP users were and are exposed posed a risk or threat to their health.

60. Throughout this entire period, the defendants, acting individually and collectively through their respective trade associations, acted affirmatively to suppress, discredit and/or minimize this emerging science.

61. Throughout this same period, the defendants, acting individually and collectively through their respective trade associations, took steps to ensure that they would be free to manufacture and mass market WHHPs to the consuming public, free from the constraints of any reasonable and necessary safety standards regulating RFR exposure. They accomplished this by obtaining and exercising dominance and control over the American National Standards Institute ("ANSI") Committee responsible for developing safety standards for RFR emitting devices.

62. In 1966, long before defendants began producing

WHHPs, ANSI adopted an RFR exposure limit of 10 mW/cm2, which was identified as ANSI Standard C95.1-1966 ("ANSI-1966"). However, this standard was based solely on the thermal effects associated with RFR, and did not contemplate or consider the possibility that RFR exposure could give rise to non thermal biological injury and subsequent adverse health effects. Nevertheless, prior to 1989, the defendants relied upon this irrelevant ANSI Standard to make unfounded and improper representations to the consuming public that WHHPs were safe for their intended use without the use of a headset.

63. In 1989, at an ANSI meeting, representatives of the WHHP industry, including the defendants herein, sought an exclusion for WHHPs from ANSI-1966. The defendants' proposal would have exempted from ANSI-1966 all devices using less than seven (7) watts of power. Such an exclusion would have effectively exempted all WHHPs from ANSI-1966. At this initial meeting, the efforts of the defendants and others to achieve the exclusion failed, and the vote for the exclusion was defeated.

64. Approximately one month later, a smaller group of the ANSI RFR Safety Standard Committee met and the exclusion clause was again pressed at the urging of the defendants. On this occasion, the proposal was approved, and WHHPs were exempted from ANSI-1966. As a consequence of this action, WHHPs were aggressively marketed thereafter without any safety standard to protect plaintiffs and other Class members from the harmful effects of RFR exposure.

65. In the early 1990's, after successfully contriving to exempt themselves from ANSI regulation and as credible concerns continued to surface regarding the safety of WHHPs, the defendants, individually and through their trade associations, undertook with great public fanfare to fund scientific inquiry into the potential health hazards posed by the use of WHHPs. When this industry-funded research

failed to corroborate the industry's reckless and premature claims of safety, and, in fact, presented new evidence of potential health concerns, the industry responded by terminating the research funding and publicly disparaging, suppressing and minimizing the results.

66. Despite their knowledge of the literature, research and the industry's own studies, the defendants continued falsely and wrongfully to maintain that WHHPs posed no threat to human health despite mounting abundant evidence to the contrary.

67. At all relevant times, the biological injury caused by low level RFR of WHHPs which, in turn, gives rise to risks to the users' health, was fully known and appreciated by the defendants. At all relevant times, the defendants should have and easily could have minimized, reduced and or eliminated this health risk by acknowledging its existence and providing to each purchaser of WHHPs a hands free earpiece or headset with appropriate instructions for use. The defendants failed and/or refused to take this simple step to reduce the health risks to consumers for fear that such action would inhibit their ability to mass market WHHPs to the consuming public, including to plaintiffs and others members of the Class.

68. On January 26, 1993, defendant Motorola, through one of its senior executives, announced to the news media, which subsequently reported to the public, that "thousands of studies" had shown that cellular phones were "safe." This statement was false and misleading.

69. On July 16, 1993, in furtherance of its dishonest campaign to assure the consuming public of the purported "safety" of WHHPs, the Cellular Telecommunications Industry Association ("CTIA"), representing many of the named defendants, held a press conference and issued a report entitled "Safety Update-Fast Facts: Portable Cell Phone Safety," which, in bold print, falsely and deceptively stated: **"Rest assured. Cellular telephones are safe!"** The

report further stated that WHHPs fell within the safety standards of the FCC. However, the defendants fraudulently and deceitfully omitted the fact that the FCC had declared that it does not consider itself the "agency" responsible for evaluating the health effects of RFR and WHHPs.

70. This industry deception prompted Elizabeth Jacobson, Deputy Director for Science at the Center for Devices and Radiological Health of the U.S. Food and Drug Administration ("FDA"), on July 19, 1993 to send a letter to CTIA president Thomas Wheeler, which clearly questioned and challenged the false and misleading statements made by the defendants to the public regarding the "safety" of WHHPs. In pertinent part, that letter stated:

> "I am writing to let you know that we were concerned about two important aspects of your press conference on July 16 concerning the safety of cellular phones, and to ask that you carefully consider the following comments when you make future statements to the press.
>
> First, both the written press statements and your verbal comments during the conference seemed to display an unwarranted confidence that these products will be found to be absolutely safe. In fact, the unremittingly upbeat tone of the press packet strongly implies that there can be no hazard, leading the reader to wonder why any further research would be needed at all. (Some readers might also wonder how impartial the research can be when its stated goal is "a determination to reassure consumers," and when the research sponsors predict in advance that "we expect the new research to reach the same conclusion, that the cellular phones are safe.")....

> We are even more concerned that your press statements did not accurately characterize the relationship between CTIA and the FDA .... [S]ince it is not yet clear whether we will help to direct the research program, it is premature to state that we will credential the research.
> To sum up, Mr. Wheeler, our role as a public health agency is to protect health and safety, not to "reassure consumers." I think it is very important that the public understand where we stand in evaluating the possibility that cellular phones might pose a health risk ....

71. In or about late 1993 or early 1994, the cell phone industry, including the named defendants, through CTIA, organized a committee to prepare a manual for public consumption discussing "responsible" WHHP use. After receiving a draft of the manual, Thomas Wheeler, president of CTIA, sent a memorandum to the drafting committee expressing his concerns over certain language in the draft which acknowledged and/or implied that the use of WHHPs could pose health risks. Mr. Wheeler's memorandum suggested significant substantive deletions from the draft. The committee thereafter deleted the offending material, set forth below in brackets and bold typeface:

> "Do not operate your transportable cellular telephone when holding the antenna, or when any person is within 4 inches (10 centimeters) of the antenna. **[Otherwise you may impair call quality, may cause your phone to operate at a higher power level than is necessary, and may expose that person to RF energy in excess of the levels established by the updated ANSI Standard.**
>
> **If you want to limit RF exposure even further, you may choose to control the**

> **duration of your calls or maintain a distances from the antenna of more than 4 inches (10 centimeters)].**
>
> For best call quality, keep the antenna free from obstructions and point it straight up."

72. Subsequent to, and as a direct consequence of the filing of other proceedings raising concerns about biological injury from RFR, the defendants (or some of them) began to provide to purchasers and lessees of WHHPs with a copy of the FDA's "Update on Mobile Phones" dated October 2000 (the "Update"). The Update is included by some defendants as an insert to the packaging for newly purchased WHHPs.

73. The FDA's "Update" informs the consuming public as follows:

> **The U.S. Food and Drug Administration's Center for Devices and Radiological Health Consumer Update on Mobile Phones.**
>
> ...Why the concern?
> Mobile phones emit low levels of radio frequency energy (i.e., radio frequency radiation) in the microwave range while being used. They also emit very low levels of radio frequency energy (RF), considered non-significant, when in the stand-by mode. It is well known that high levels of RF can produce biological damage through heating effects (this is how your microwave oven is able to cook food). *However, it is not known whether, to what extent, or through what mechanism, lower levels of RF might cause adverse health effects as well. Although some research has been done to address these questions, no clear picture of the biological effects of this type of radiation has emerged to*

date. Thus, the available science does not allow us to conclude that mobile phones are absolutely safe, or that they are unsafe... (Emphasis added).

How much evidence is there that hand-held mobile phones might be harmful?

Briefly, there is not enough evidence to know for sure, either way: however, research efforts are on-going. The existing scientific evidence is conflicting and many of the studies that have been done to date have suffered from flaws in their research methods.

...What is FDA's role concerning the safety of mobile phones?

Under the law, FDA does not review the safety of radiation emitting consumer products such as mobile phones before marketing, as it does with new drugs or medical devices...

Although the existing scientific data do not justify FDA regulatory actions at this time, FDA has urged the mobile phone industry to take a number of steps to assure public safety. The agency has recommended that the industry:

- support needed research into possible biological effects of RF of the type emitted by mobile phones;
- design mobile phones in a way that minimizes any RF exposure to the user that is not necessary for device function; and
- cooperate in providing mobile phone users with the best possible

> information on what is known about possible effects of mobile phone use on human health.

74. In addition to furnishing this FDA Update as a package insert, some defendants also began including headsets as part of the package of newly purchased WHHPs.

VI. DEFENDANTS' MISCONDUCT

75. At all relevant times, plaintiffs and other members of the Class were and continue to be misinformed, misled and deceived by the defendants to the effect that WHHPs are safe and pose no threat to human health.

76. At all relevant times, defendants controlled the design, assembly, platform for usage, manufacture, marketing and sales of WHHPs, which were widely advertised by the defendants as posing no threat to human health.

77. The product warnings in effect during the period relevant to this Complaint were both substantively and graphically wholly inadequate to alert plaintiffs and the Class as to the risks associated with WHHP use.

78. Defendants have never adequately informed the public about the risks of biological injury which poses a health risk to WHHP users, or of the fact that the risk of injury can differ with the amount of use and the sensitivity of the user.

79. The defendants knew or, by the application of reasonable, developed human skill and foresight, should have known of the unreasonably dangerous characteristics of WHHPs because such knowledge was, at all times relevant to the claims herein, part of the "state of the art" body of knowledge in the relevant scientific and medical communities.

80. At all times relevant to the claims herein, defendants failed to conduct adequate testing and research

regarding the dangerous characteristics of WHHPs. Not only did the defendants fail to engage in pre market testing of WHHPs, but after introducing WHHPs into the marketplace, defendants continued to fail to fulfill their ongoing obligation to conduct adequate testing and research regarding the dangerous characteristics of WHHPs.

COUNT I
(Violation of New York Consumer Protection from Deceptive Acts and Practices Act, NY GEN BUS § 349, *et seq.*)

81. Paragraphs 1 through 80 are herein incorporated by reference as though the same were set forth below at length.

82. Plaintiffs, on behalf of themselves and other members of the Class, bring this Count pursuant to New York's Consumer Protection from Deceptive Acts and Practices Act, NY GEN BUS § 349, *et seq.* (the "Act").

83. New York enacted the Act to protect consumers from unfair, deceptive and/or fraudulent business practices, and from unfair competition and false advertising. The Act provides consumers with a private right of action.

84. The Act creates a cause of action against those who engage in deceptive acts and practices and those who engage in false advertising.

85. Defendants violated the Act by their use of false and misleading misrepresentations or omissions of material fact in connection with their manufacture, distribution and sale of WHHPs and the mobile networks necessary for their operation. Defendants uniformly communicated the purported benefits of WHHPs, while failing to adequately disclose and omitting and concealing the potential serious and dangerous risks associated with use of the WHHPs. Further, there is a presumption of classwide reliance upon defendants' representations because the defects were not of

the type which consumers, including plaintiff and the Class, could discover on their own about the biological injury, health risks and biological effects of the use of WHHPs.

86. By the omission and concealment of the material facts alleged above, the defendants deceived and continue to deceive consumers. This conduct constitutes unlawful, unfair, deceptive and/or fraudulent business practices within the meaning of the Act.

87. Defendants violated the Act by misleadingly, falsely and/or deceptively misrepresenting and/or omitting material facts regarding, among other things, the utility, benefits, costs, safety and efficacy and advantages of the . WHHPs, as described above.

88. As a result of violating the Act, defendants are liable to plaintiffs and the Class for actual damages, or $50 for each unlawful transaction, whichever is greater, and to plaintiffs and the Class for costs and reasonable attorneys' fees and court costs, and for the trebling of damages awarded, and exemplary or punitive damages.

WHEREFORE, plaintiffs respectfully request that the Court grant the following relief:

a. enter an order pursuant to F.R.C.P. 23 and NY CPLR § 901 permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing plaintiffs as the representatives of the Class, and plaintiffs' counsel as counsel for the Class;

b. enter judgment in favor of plaintiffs and the Class against defendants, jointly and severally, and/or as may be apportioned by the Court or finder of fact, for actual damages of the plaintiffs and the Class and for all other relief, in an amount to be proved at trial, including, but not limited to, the costs of purchasing headsets for the WHHPs (including reimbursing Class members who already have purchased headsets) and any other costs and expenses, with minimum damages of $50 per Class member, together with treble damages, interest, attorneys' fees, expert fees and the

costs of suit;

c. providing each Class member who has not been so provided, a WHHP which can be used with a headset;

d. enter declaratory and injunctive relief against defendants, requiring written instructions for the use of the headsets, including an explanation of the reasons why the headsets should be used; and

e. award such further relief as provided for, under and pursuant to the Act, and as this Court deems necessary, just and proper.

COUNT II
(BREACH OF IMPLIED WARRANTY)

89. Paragraphs 1 through 88 are incorporated herein by reference as though the same were fully set forth below at length.

90. Under New York common and statutory law, a warranty of merchantability and a warranty of fitness for particular purpose are implied in all sales transactions where the seller has reason to know the particular purpose for which the product is to be used and that the consuming public is relying on the skill or judgment of the seller to furnish a suitable product. A warranty of merchantability is a warranty implied by law that a product is fit for the ordinary purposes for which it is used, is properly labeled and conforms to the representations made about it. See NY UCC §2-314. A warranty of fitness for a particular purpose is a warranty implied by law that a product is fit for its intended use. See NY UCC § 2-315.

91. Defendants' WHHPs, in conjunction with the mobile networks necessary for use of the WHHPs, were subject to both an implied warranty of merchantability and an implied warranty of fitness for a particular purpose.

92. Defendants breached said warranties in the manner described above.

93. Plaintiffs and the Class have been damaged by defendants' breaches of warranties in the manner described above.

WHEREFORE, plaintiffs respectfully request that the Court grant the following relief:

a. enter an order permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing plaintiffs as the representative of the Class, and plaintiffs' counsel as counsel for the Class;

b. enter judgment in favor of plaintiffs and the Class against defendants, jointly and severally, and/or as may be apportioned by the Court or finder of fact, for compensatory damages consisting, among other things, of the costs of headsets, as well as interest, attorneys' fees, expert fees and costs of suit;

c. providing each Class member who has not been so provided, a WHHP which can be used with a headset;

d. enter declaratory and injunctive relief against defendants, requiring written instructions for the use of the headsets, including an explanation of the reasons why the headsets should be used; and

e. award such further relief as the Court deems just and proper.

COUNT III
(FRAUDULENT CONCEALMENT)

94. Paragraphs 1 through 93 are incorporated herein by reference as though the same were fully set forth below at length.

95. Under New York common law, one party to a transaction, who by concealment or other action, intentionally prevents the other party to that transaction from acquiring material information, is subject to the same liability to the other party for pecuniary loss as though he or she had affirmatively represented the non-existence of the

information that the other was thus prevented from discovering.

96. Defendants at all relevant times had knowledge of the dangers and hazards association with the WHHPs and the mobile networks necessary for this use.

97. Defendant at all relevant times had reason to believe that the facts concerning the dangers and hazards associated with the WHHPs and mobile networks necessary for their use were unknown to plaintiffs and the Class.

98. Defendants had the opportunity to communicate the above dangers and hazards to plaintiffs and the Class.

99. Defendant as had a duty to disclose information they had concerning the above dangers and hazards to plaintiffs and the Class.

100. Defendants intentionally misrepresented material facts concerning the above referenced dangers and hazards to plaintiffs and the Class in an attempt to conceal the truth concerning the above dangers and hazards and to deceive plaintiffs and the Class.

101. Defendants, by their concealment and other fraudulent actions described above, intentionally prevented the plaintiff and other members of the Cuss from acquiring material information concerning the dangers and hazards associated with WHHPs and the mobile networks necessary for their use.

102. Plaintiffs and the Class have been damaged by defendants' fraudulent concealment.

103. Defendants are subject to the same liability to plaintiffs and the members of the Class for the damages and other relief as a result of defendants' concealment as though defendants had affirmatively stated that there were no risks or hazards associated with use of the WHHPs, thus preventing plaintiffs and the Class from discovering the hazards and risks.

WHEREFORE, plaintiffs respectfully request that the Court grant the following relief:

a. enter an order pursuant to F.R.C.P. 23 and NY CPLR § 901 permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing plaintiffs as the representatives of the Class, and plaintiffs' counsel as counsel for the Class;

b. enter judgment in favor of the plaintiffs and the Class against defendants, jointly and severally, and/or as may be apportioned by the Court or finder of fact, for compensatory damages consisting, among other things, of the costs of headsets, as well as interest, attorneys' fees, expert fees and costs of suit;

c. providing each Class member who has not been so provided, a WHHP which can be used with a headset;

d. enter declaratory and injunctive relief against defendants, requiring written instructions for the use of the headset, including an explanation of the reasons why the headsets should be used; and

e. award such further relief as the Court deems just and proper.

COUNT IV
(STRICT LIABILITY FAILURE TO WARN)

104. Paragraphs 1 through 103 are incorporated herein by reference as though the same were fully set forth below at length.

105. The WHHPs purchased by the plaintiffs and the Class were placed in the stream of commerce and sold by the defendants in a defective and unreasonably dangerous condition in that the WHHP failed to include proper warnings regarding all possible adverse health effects associated with the use of WHHPs and the harmful effects of the radiation emitted from the WHHPs to plaintiffs and the Class.

106. The WHHPs manufactured and/or supplied by the defendants reached the plaintiffs and other members of

the Class without any substantial change in their condition and were in that same condition when used by plaintiffs and the Class.

107. Defendants also failed to warn plaintiffs and other members of the Class that other methods for using WHHPs were available, such as, but not limited to, a headset and/or other protective devices, which would have prevented the adverse health effects associated with the use of WHHPs.

108. The WHHPs purchased by the plaintiffs and other members of the Class were both defective and unreasonably dangerous due to inadequate warnings or instructions because, after defendants knew or should have known of the risks from their use, defendants failed to provide adequate warnings or instructions to consumers as herein alleged. Defendants continued to aggressively promote the WHHPs and failed to provide a protective device including, but not limited to, a headset.

109. The failure to provide adequate warnings or instructions as herein alleged or to provide a protective device including, but not limited to, a headset, made the WHHPs unreasonably dangerous.

110. The product warnings in effect during the period relevant to this Complaint were both substantively and graphically wholly inadequate to alert plaintiffs and the Class as to the risks associated with WHHP use.

111. Defendants have never adequately informed the public about the risks of biological injury which poses a health risk to WHHP users, or of the fact that the risk of injury can differ with the amount of use and the sensitivity bf the user.

112. As a direct and proximate result of the defective and unreasonably dangerous condition of the WHHPs as alleged above, plaintiffs, and other members of the Class were and continue to be exposed to a health risks.

113. At all times relevant hereto, defendants actually knew of the defective nature of their products as herein set

forth and continued to design, manufacture, market, sell and provide service for their products so as to maximize sales and profits at the expense of public health and safety. At all relevant times, defendants could have eliminated or significantly mitigated the health risks alleged herein by acknowledging their existence and providing purchasers such as the plaintiffs and the Class with a headset with appropriate warnings and instructions for use. Defendants' abject refusal or failure to so act was motivated solely by their desire to maximize sales and profits at the expense of the users' health.

WHEREFORE, plaintiffs respectfully requests that the Court grant the following relief:

a. enter an order pursuant to F.R.C.P. 23 and NY CPLR § 901 permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing plaintiffs as the representative of the class, and plaintiffs' counsel as counsel for the class;

b. enter judgment in favor of plaintiffs and the class against defendants, jointly and severally, and/or as may be apportioned by the Court or finder of fact, for compensatory damages consisting, among other things, of the costs of a headset, as well as interest, attorneys' fees, expert fees and costs of suit;

c. providing each Class member who has not been so provided, a WHHP which can be used with a headset;

d. enter declaratory and injunctive relief against defendants, requiring written instructions for the use of the headset, including an explanation of the reasons why the headsets should be used; and

e. award such further relief as the Court deems just and proper.

COUNT V
(STRICT LIABILITY - DESIGN OR MANUFACTURING DEFECT)

114. Paragraphs 1 through 113 are incorporated herein by reference as though the same were fully set forth below at length.

116. The WHHPs designed, manufactured and/or supplied by the defendants were placed in the stream of commerce in a defective and/or in an unreasonably dangerous condition in that defendants failed to incorporate adequate equipment, instructions, and/or warnings to protect plaintiff and other members of the Class from the health risks created by WHHPs and biological injury caused by same.

117. The WHHPs manufactured and/or supplied by the defendants were defective in design and/or manufacture because, when they were placed in the stream of commerce, they failed to contain or incorporate a headset or other protective device to eliminate or reduce the users' exposure to RFR.

118. The WHHPs reached plaintiff and other members of the Class without substantial change in their condition and were in that same condition at the time of the use alleged.

119. The design or manufacturing defect alleged herein rendered the WHHPs manufactured or supplied by the defendants unreasonably dangerous when used in the manner intended by the defendants and, as a result, defendants are strictly liable to plaintiff and the other Class members.

120. At the time that the WHHPs left the defendants' possession, the WHHPs were unreasonably dangerous to the plaintiff and other Class members and the defendants had safe alternatives or modifications which were economically feasible.

121. As a direct and proximate result of the defective

and unreasonably dangerous condition of WHHPs as manufactured and/or supplied by defendants, plaintiff and other Class members were exposed to health risks described herein.

122. At all times relevant hereto, the defendants actually knew of the defective nature of their products as herein set forth and continued to design, manufacture, market, sell and provide service for their products so as to maximize sales and profits at the expense of public health and safety. At all relevant times, defendants could have eliminated or significantly mitigated the health risks alleged herein by acknowledging their existence and providing purchasers such as plaintiffs and the Class with a headset with appropriate warnings and instructions for use. Defendants' abject refusal or failure to so act was motivated solely by their desire to maximize sales and profits at the expense of the users' health.

WHEREFORE, plaintiffs respectfully request that the Court grant the following relief

a. enter an order pursuant to F.R.C.P. 23 and NY CPLR.§ 901 permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing plaintiffs as the representatives of the Class, and plaintiffs' counsel as counsel for the Class;

b. enter judgment in favor of plaintiffs and the Class against defendants, jointly and severally, and/or as may be apportioned by the Court or finder of fact, for compensatory damages consisting, among other things, of the costs of headsets, as well as interest, attorneys' fees, expert fees and costs of suit;

c. providing each Class members who has not been so provided, a WHHP which can be used with a headset;

d. enter declaratory and injunctive relief against defendants, requiring written instructions for the use of the headset, including an explanation of the reasons why the headsets should be used; and

e. award such further relief as the Court deems just and proper.

COUNT VI
(DECLARATORY RELIEF)

123. Paragraphs 1 through 122 are incorporated herein by reference as though the same were fully set forth below at length.

124. This claim is asserted on behalf of plaintiffs and the Class in accordance with the New York Declaratory Judgments Act, NY CPLR § 3001.

125. Plaintiffs and the Class are entitled to a declaration that defendants' conduct described herein constitutes violations of applicable New York statutory and common law. The declaratory relief requested is an order declaring defendants' conduct, as alleged herein, to be unlawful, and requiring defendants to supply WHHP users with headsets for the WHHPs currently in use (and, if necessary, a new WHHP) and headsets for all WHHPs sold in the future, together with appropriate instructions as alleged herein.

WHEREFORE, plaintiff respectfully request that the Court grant the following relief

a. enter an order pursuant to F.R.C.P. 23 and NY CPLR § 901 permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing plaintiffs as the representatives of the Class, and plaintiffs' counsel as counsel for the Class;

b. enter an order requiring defendants to furnish plaintiffs and the Class with a headset and appropriate instructions;

c. award plaintiffs and the Class their attorneys' fees, litigation expenses and costs; and.

d. award such other and further relief as the Court deems just and proper.

COUNT VII
(PUNITIVE DAMAGES)

126. Paragraphs 1 through 125 are incorporated herein by reference as though the same were fully set forth at length.

127. Defendants' conduct was wanton, willful and so egregious as to warrant the award or exemplary or punitive damages.

WHEREFORE, plaintiffs respectfully request that the Court enter an order awarding plaintiffs and the Class punitive or exemplary damages, together with attorneys' fees, litigation expenses and the costs of suit.

JURY DEMAND

Plaintiff demands a trial by jury on all Courts so triable.

Dated: April 20, 2001
LAW OFFICES OF PETER G. ANGELOS, P.C.

s/Peter G. Angelos
Peter G. Angelos
s/Steven Thaler
Steven Thaler
115 Broadway, 3rd Floor
New York, NY 10006
(212)

LAW OFFICES OF KENNETH A. JACOBSEN
Kenneth A. Jacobsen
Nancy B. Grogan
22 West Front Street

Media, PA 19063
(610)566-7930

Joseph A. O'Keefe
O'KEEFE & SHER, P.C.
I.D. No. 77068
15019 Kutztown Road
Kutztown, PA
(610)683-0771

LOWE, STEIN, HOFFMAN, ALLWEISS
& HAUVER, LLP.
701 Poydras Street
One Shell Square, Suite 3600
New Orleans, LA 70139
(504)581-2450

APPENDIX G

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

PLAINTIFF
RIEDY GIMPELSON,
Plaintiff individually and on behalf of others similarly situated,

v.

NOKIA, INC.
A/K/A Nokia Mobile Phones, Inc.
6000 Connection Drive
Irving, Texas 75039
SERVE ON: National Registered Agents, Inc.
3761 Venture Drive
Duluth, GA 30096
and
NEC AMERICA, INC. ("NEC")
8 Corporate Center Drive
Melville, New York 11747
SERVE ON: Corporation Service Company
4845 Jimmy Carter Boulevard
Norcross, GA 30093
and
ERICSSON WIRELESS COMMUNICATIONS, INC.
A/K/A Ericsson, Inc
6300 Legacy Drive
Richardson, Texas 75024
SERVE ON: National Registered Agents, Inc.
3761 Venture Drive
Duluth, GA 30096
and
MOTOROLA, INC.

1303 E. Algonquin Rd.
Schaumburg, Illinois 60196
SERVE ON: C.T. Corporation System
1201 Peachtree Street, N.E.
Atlanta, GA 30361
and
MOTOROLA CELLULAR SERVICE, INC.
1303 E. Algonquin Rd., Attn: Tax
Schaumburg, Illinois 60196
SERVE ON: C.T. Corporation System
1201 Peachtree Street, N.E.
Atlanta, GA 30361
and
MOTOROLA COMMUNICATIONS AND ELECTRONICS, INC.
1303 E. Algonquin Rd.
Schaumburg, Illinois 60196
SERVE ON: C.T. Corporation System
1201 Peachtree Street, N.E.
Atlanta, GA 30361
and
SPRINT COMMUNICATIONS COMPANY LP
A/K/A Sprint
6500 Sprint Parkway, HL 5A-STX
Overland Park, Kansas 66251
SERVE ON: Prentice Hall Corp System
4845 Jimmy Carter Boulevard
Norcross, GA 30093
and
SPRINT SPECTRUM LP
A/K/A Sprint
4900 Main Street, 12th Floor
Kansas City, Missouri 64112
SERVE ON: Prentice Hall Corp System
4845 Jimmy Carter Boulevard
Norcross, GA 30093

and

AUDIOVOX COMMUNICATIONS CORPORATION
A/K/A Audiovox Corporation
150 Marcus Blvd, POB 18000
Hauppauge, New York 11788
SERVE ON: United Corporate Services
4228 First Avenue, Suite 15
Tucker, GA 30084

and

NEXTEL COMMUNICATIONS, INC.
A/K/A Nextel,
2001 Edmund Halley Drive
Reston, Virginia 20191
SERVE ON: Timothy M. Donahue, President
2001 Edmund Halley Drive
Reston, Virginia 20191

and

NEXTEL SOUTH CORP.
A/K/A Nextel,
A/K/A Nextel Communications
6575 The Corners Parkway
Norcross, Georgia 30092
SERVE ON: Corporation Service Company
4845 Jimmy Carter Boulevard
Norcross, GA 30093

and

NEXTEL OPERATIONS, INC.
A/K/A Nextel,
A/K/A Nextel Communications
2001 Edmund Halley Drive
Reston, Virginia 20191
SERVE ON: Corporation Service Company
4845 Jimmy Carter Boulevard
Norcross, GA 30093

and

NEXTEL PARTNERS OPERATING CORP.

A/K/A Nextel,
A/K/A Nextel Communications
4500 Carillon Point
Kirkland, Washington 98033
SERVE ON: Corporation Service Company
4845 Jimmy Carter Boulevard
Norcross, GA 30093

and

MATSUSHITA ELECTRIC CORPORATION OF AMERICA
A/K/A Panasonic Corporation
One Panasonic Way
Secaucus, NJ 07094
SERVE ON: C.T. Corporation System
1201 Peachtree Street, N.E.
Atlanta, GA 30361

and

PHILIPS ELECTRONICS NORTH AMERICA CORPORATION
A/K/A Philips Electronic Instruments, Inc.
1251 Avenue of the Americas
New York, New York 10020
SERVE ON: Corporation Service Company
4845 Jimmy Carter Boulevard
Norcross, GA 30093

and

QUALCOMM INCORPORATED
A/K/A Qualcomm, Inc.
5775 Morehouse Drive
San Diego, California, 92121
SERVE ON: Prentice-Hall Corp System, Inc.
4845 Jimmy Carter Boulevard
Norcross, GA 30093

and

SAMSUNG ELECTRONICS AMERICA, INC.
A/K/A Samsung Electronics

299 Cherry Hill Road, P.O. Box 438
Parsippany, NJ 07660
SERVE ON: The Prentice Hall Corp Sys
4845 Jimmy Carter Boulevard
Norcross, GA 30093
and
SANYO NORTH AMERICA, INC.
A/K/A Sanyo North America Group
2055 Sanyo Avenue
San Diego, California 92154
SERVE ON: Masafumi Matsunaga, President
Sanyo North America, Inc.
2055 Sanyo Avenue
San Diego, CA 92154
and
SONY ELECTRONICS, INC.
Sony Drive
Park Ridge, New Jersey 07656
SERVE ON: C.T. Corporation
1201 Peachtree Street
Atlanta, GA 30361
and
AT&T CORP.
A/K/A AT&T
412 Mount Kemble Avenue S287
Morristown, New Jersey 07960
SERVE ON: C.T. Corporation System
1201 Peachtree Street
Atlanta, GA 30361
and
AT&T WIRELESS PCS, LLC
A/K/A AT&T
7277 164th Avenue, NE
Redmond, Washington 98052
SERVE ON: C.T. Corporation System
1201 Peachtree Street

Atlanta, GA 30361
and
AT&T WIRELESS SERVICES, INC.
A/K/A AT&T
P.O. Box 97061
Redmond, Washington 98073
SERVE ON: C.T. Corporation System
1201 Peachtree Street
Atlanta, GA 30361
and
VERIZON WIRELESS (VAW) LLC
A/K/A Bell Atlantic
A/K/A Nynex, A/K/A Bell Atlantic Mobile, Inc.
formerly known as Bell Atlantic
One California Street/21st Floor
San Francisco, CA 94111
SERVE ON: Corporation Service Co.
4845 Jimmy Carter Blvd.
Norcross, GA 30093
and
VERIZON WIRELESS SERVICES, LLC
A/K/A Bell Atlantic
A/K/A Nynex, A/KA Bell Atlantic Mobile. Inc.
formerly known as Bell Atlantic Nynex Mobile, Inc.
180 Washington Valley Road
Bedminster, New Jersey 07921
SERVE ON: C.T. Corporation System
1201 Peachtree Street
Atlanta, GA 30361
and
CINGULAR WIRELESS LLC
formerly known as BellSouth Mobility
5565 Glenridge Connector
Atlanta, GA 30342
SERVE ON: Neal Berinhout
5565 Glenridge Connector

Atlanta, GA 30342
and
CINGULAR WIRELESS CORPORATION
formerly known as BellSouth Mobility
5565 Glenridge Connector
Atlanta, GA 30342
SERVE ON: Neal Berinhout
5565 Glenridge Connector
Atlanta, GA 30342
and
SBC TELECOM INC.
175 East Houston Street
San Antonio, Texas 78205
SERVE ON: C.T. Corporation
1201 Peachtree Street, N.E.
Atlanta, GA 30361
and
VOICESTREAM WIRELESS CORPORATION
A/K/A VoiceStream Wireless
12920 S.E. 8th Street
Bellvue, Washington, 98006
SERVE ON: Corporation Service Company
4845 Jimmy Carter Boulevard
Norcross, GA 30093
and
SOUTHERN TELECOM INC.
A/K/A Southern Linc
241 Ralph McGill Blvd., NE
Atlanta, GA 30308
SERVE ON: Corporation Service Company
4845 Jimmy Carter Boulevard
Norcross, GA 30093
and
POWERTEL, INC.
1233 O G Skinner Drive
West Point, GA 31833

SERVE ON: William H. Scott, III
1233 O G Skinner Drive
West Point, GA 31833
and
POWERTEL PCS, INC.
1233 O G Skinner Drive
West Point, GA 31833
SERVE ON: Corporation Service Company
4845 Jimmy Carter Boulevard
Norcross, GA 30093
and
POWERTEL/ATLANTA, INC.
1233 O G Skinner Drive
West Point, GA 31833
SERVE ON: Corporation Service Company
4845 Jimmy Carter Boulevard
Norcross, GA 30093
and
MCI WORLDCOM COMMUNICATIONS, INC.
500 Clinton Center Dr.
Clinton, MS 39056
SERVE ON: National Registered Agents. Inc.
3761 Venture Drive
Duluth, GA 30096
and
GTE WIRELESS, INC.
A.K.A. Bell Atlantic Mobile, d/b/a Verizon Wireless
One Verizon Place, Building 1
Atlanta, GA 30004
SERVE ON: C.T. Corporation Sys
1201 Peachtree Street, N.E.
Atlanta, GA 30361
and
MITSUBISHI WIRELESS COMMUNICATIONS, INC.
3805 Crestwood Parkway Suite 350
Duluth, GA 30096

SERVE ON: C.T. Corporation Sys.
1201 Peachtree Street, N.E.
Atlanta, GA 30361
and
GLOBALSTAR USA, INC.
1340 Treat Boulevard, Suite 500
Walnut Creek, CA 94596
SERVE ON: Corporation Service Company
4845 Jimmy Carter Boulevard
Norcross, GA 30093

Defendants

Civil Action No.
2001CV38932

COMPLAINT

NOW COMES Riedy Gimpelson, by and through Weinstock and Scavo, P.C., her undersigned counsel of record, on behalf of herself and all other persons similarly situated, pursuant to O.C.G.A. § 9-11-23, and show this Honorable Court as follows:

I. NATURE OF THE CASE

1. Through a course of conduct, the Defendants have manufactured, supplied, promoted, sold, leased and provided service for wireless handheld telephones (WHHP) when they knew or should have known that their products generate and emit radio frequency radiation ("RFR") that causes an adverse cellular reaction and/or cellular dysfunction ("biological injury") through its adverse health effect on: calcium ion distribution across the cell membrane, melatonin production, neurological function, DNA (single and double strand breaks and chromosome damage), enzyme

activities, cell stress and gene transcription, and the permeability of the blood brain barrier (collectively hereinafter sometimes described as "the health risk" and/or "the biological effects").

2. Through a course of conduct the Defendants, acting individually and collectively, failed to adequately disclose to the consuming public the fact that WHHPs emit RFR that causes biological injury creating a risk to the user's health.

3. WHHPs are sold in the United States and throughout the world. More than 100 million Americans use WHHPs and over 400 million have been sold throughout the world.

4. This action is brought for monetary damages, declaratory and/or equitable relief.

5. The purpose of this action is to hold accountable and to obtain maximum legal and equitable relief from those corporations and entities that are responsible for producing and placing into the stream of commerce WHHPs, which create a health risk to users by causing biological injury.

6. WHHPs are wireless communication devices which transmit a wireless signal from the antenna of the WHHP to the antenna at a cell tower or from the antenna at a cell tower to the antenna on the WHHP depending upon whether the WHHP user is making a telephone call or receiving a telephone call.

7. WHHPs are powered by a battery which creates the radio frequency radio waves.

8. The waves referred to in paragraph 6 travel from the antenna on the WHHP to a cell tower or from the cell tower to the antenna on the WHHP.

9. RFR is emitted from the antenna and penetrates the user's human tissue.

10. Research and peer reviewed literature has demonstrated that RFR from WHHPs causes certain types of

biological injury which, in turn, creates risk to the users' health.

II. JURISDICTION AND VENUE

11. The Court has jurisdiction over this action and the Defendants pursuant to Article VI, § 4, Paragraph I of the Constitution of the State of Georgia, O.C.G.A. § 15-6-8 O.C.G.A. and §§ 9-10-90 *et. seq.* Plaintiff purchased her WHHPs in Georgia and was thereby damaged as set forth herein. The Defendants are all doing business in Georgia, received substantial compensation and profits from the promotion of, sale of, lease of and/or provision of service for WHHPs in Georgia and have made material omissions and misrepresentations in Georgia. At all times relevant herein, acts and conduct in furtherance of the conspiracy, which is the hub of the wrongful, conduct alleged herein, occurred in Georgia.

III. PARTIES

A. PLAINTIFF AND PROPOSED CLASS REPRESENTATIVE.

12. Plaintiff Riedy Gimpelson is an adult individual who resides at, 200 Cole Wood Way, Atlanta, Georgia 30328. Between approximately 1997 and the present Plaintiff purchased three (3) WHHPs which were sold without a headset. The WHHPs were manufactured by Defendants Motorola and Ericsson. Incident to and as a result of these purchases, Plaintiff was provided service by Defendants Sprint and Powertel. In approximately January of 2001, Plaintiff purchased a headset.

B. DEFENDANTS

13. At all times relevant to this Complaint, the Defendant, Nokia, Inc. a/k/a Nokia Mobile Phones, Inc. ("Nokia") is a Delaware corporation, and was authorized to

do business under the laws of the State of Georgia, with its principal place of business at 6000 Connection Drive, Irving, Texas 75039. At all times relevant herein, NOKIA, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacted business in Atlanta, Georgia and elsewhere in this State, as well as nationally and internationally. Defendant is subject to the jurisdiction of this court and venue is appropriate.

14. At all times relevant to this Complaint, Defendant NEC America, INC. ("NEC") is a corporation organized and existing under the laws of the State of New York, and was authorized to do business under the laws of the State of Georgia, with its principal place of business at 8 Corporate Center Drive, Melville, New York 11747. At all times relevant herein, NEC, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacted business in Atlanta, Georgia and elsewhere in this State, as well as nationally and internationally. Defendant is subject to the jurisdiction of this court and venue is appropriate.

15. At all times relevant to this Complaint, Defendant Ericsson Wireless Communications, Inc. A/K/A Ericsson, Inc. ("ERICSSON") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Georgia, with its principal place of business at 6300 Legacy Drive, Richardson, Texas 75024. At all times relevant herein, Ericsson, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacted business in Atlanta, Georgia and elsewhere in this State, as well as nationally and internationally. Defendant is subject to the jurisdiction of this court and venue is appropriate.

16. At all times relevant to this Complaint, Defendants Motorola, Inc., Motorola Cellular Service, Inc.

and Motorola Communications and Electronics, Inc. (hereinafter collectively referred to as "MOTOROLA") are corporations organized and existing under the laws of the State of Delaware, and were authorized to do business under the laws of the State of Georgia, having their principal place of business at 1303 E. Algonquin Road, Schaumburg, Illinois 60196. At all times relevant herein, Motorola, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business in Atlanta, Georgia and elsewhere in this State, as well as nationally and internationally. Defendant is subject to the jurisdiction of this court and venue is appropriate.

17. At all times relevant to this Complaint, Defendants Sprint Communications Company, LP and Sprint Spectrum LP, A/K/A Sprint, (hereinafter collectively referred to as "SPRINT") are Limited Partnerships organized and existing under the laws of the State of Delaware, having their respective principal places of business at 6500 Sprint Parkway, HL 5A-STX, Overland Park, Kansas 66251 and 4900 Main Street, 12th floor, Kansas City, Missouri 64112. At all times relevant herein, Sprint, through its agents, distributors, servants and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas. Defendant is subject to the jurisdiction of this court and venue is appropriate.

18. At all times relevant to this Complaint, Defendant Audiovox Communications Corporation A/K/A Audiovox Corporation. (hereinafter referred to as "AUDIOVOX") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Georgia, having its principal place of business in the State of New York at 150 Marcus Blvd, POB 18000, Hauppauge, New York

11788. At all times relevant herein, Audiovox, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business in Atlanta, Georgia and elsewhere in this State, as well as nationally and internationally. Defendant is subject to the jurisdiction of this court and venue is appropriate.

19. At all times relevant to this Complaint, Defendant Nextel Communications, Inc., Nextel Operations, Inc., Nextel South Corp. and Nextel Partners Operating Corp. A/K/A Nextel, A/K/A Nextel Communications, A/K/A Nextel Partners, Inc. (hereinafter collectively referred to as "NEXTEL") are corporations organized and existing under the laws of the State of Delaware or Georgia, having their respective principal places of business at 2001 Edmund Halley Drive, Reston, Virginia 20191 (Communications and Operations), 6575 The Corners Parkway, Norcross, Georgia 30092 and 4500 Carillon Point, Kirkland, Washington 98033. At all times relevant herein, Nextel, through its agents, distributors, servants and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas. Defendant is subject to the jurisdiction of this court and venue is appropriate.

20. At all times relevant to this Complaint, Defendant Matsushita Electric Corporation of America A/K/A Panasonic Corporation. (hereinafter referred to as "PANASONIC") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Georgia, having its principal place of business at One Panasonic Way, Secaucus, New Jersey 07094. At all times relevant herein, Panasonic, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing

and sale of WHHPs, and transacting business in Atlanta, Georgia and elsewhere in this State, as well as nationally and internationally. Defendant is subject to the jurisdiction of this court and venue is appropriate.

21. At all times relevant to this Complaint, Defendant Philips Electronic North America Corporation (hereinafter referred to as "PHILIPS") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Georgia, having its principal place of business at 1251 Avenue of the Americas, New York, New York 10020. At all times relevant herein, Philips, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business in Atlanta, Georgia and elsewhere in this State, as well as nationally and internationally. Defendant is subject to the jurisdiction of this court and venue is appropriate.

22. At all times relevant to this Complaint, Defendant Qualcomm Incorporated A/K/A Qualcomm, Inc. (hereinafter referred to as "QUALCOMM") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Georgia, having its principal place of business at 5775 Morehouse Drive, San Diego, California, 92121. At all times relevant herein, Qualcomm, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs and WHHP services. At all times relevant herein, Qualcomm was transacting business in Atlanta, Georgia and elsewhere in this State, as well as nationally and internationally. Defendant is subject to the jurisdiction of this court and venue is appropriate.

23. At all times relevant to this Complaint, the Defendant Samsung Electronics America, Inc. A/K/A Samsung Electronics (hereinafter referred to as

"SAMSUNG") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Georgia, having its principal place of business at 299 Cherry Hill Road, P.O. Box 438, Parsippany, NJ 07660. At all times relevant herein, Samsung, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business in Atlanta, Georgia and elsewhere in this State, as well as nationally and internationally. Defendant is subject to the jurisdiction of this court and venue is appropriate.

24. At all times relevant to this Complaint, Defendant Sanyo North America, Inc. and Sanyo Information Systems Corporation A/K/A Sanyo North America Group (hereinafter referred to as "SANYO") are corporations organized and existing under the laws of the State of Delaware, having their respective principal places of business at 2055 Sanyo Avenue, San Diego California 92154 and 2001 Sanyo Avenue, San Diego, California 92154. At all times relevant herein, Sanyo, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business in Atlanta, Georgia and elsewhere in this State, as well as nationally and internationally. Defendant is subject to the jurisdiction of this court and venue is appropriate.

25. At all times relevant to this Complaint, the Defendant Sony Electronics, Inc. (hereinafter referred to as "SONY") is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Georgia, having its principal place of business at The Corporation Trust Incorporated, 300 East Lombard Street, Baltimore, Maryland 21202. At all times relevant herein, Sony, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business in Atlanta, Georgia and elsewhere in

this State, as well as nationally and internationally. Defendant is subject to the jurisdiction of this court and venue is appropriate.

26. At all times relevant to this Complaint, Defendants AT&T Corp., AT& T Wireless PCS, LLC, and AT&T Wireless Services, Inc. A/K/A AT&T, (hereinafter collectively referred to as "AT&T") are, respectively, corporations, a limited liability corporation and a corporation, respectively organized and existing under the laws of the State of New York and Delaware (PCS and Services) and were authorized to do business under the laws of the State of Georgia, having their respective principal places of business at 412 Mount Kemble Avenue S287, Morristown, NJ 07960, 7277 164th Avenue, NE, Redmond, Washington 98052 and P.O. Box 97061, Redmond, Washington 98073. At all times relevant herein, AT&T, through its agents, distributors, servants and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas. Defendant is subject to the jurisdiction of this court and venue is appropriate.

27. At all times relevant to this Complaint Defendants Verizon Wireless (VAW) LLC and Verizon Wireless Services, LLC A/K/A Verizon, A/K/A Bell Atlantic, A/K/A Bell Atlantic Mobile, Inc. formerly known as Bell Atlantic Nynex Mobile, Inc. (hereinafter collectively referred to as "VERIZON") are limited liability corporations organized and existing under the laws of the State of Delaware, and were authorized to do business under the laws of the State of Georgia, having their respective principal places of business at One California Street/21st Floor, San Francisco, CA 94111 and 180 Washington Valley Road, Bedminster, New Jersey 07921. At all times relevant herein, Verizon, through its agents, distributors, servants and/or

employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas. Defendant is subject to the jurisdiction of this court and venue is appropriate.

28. At all times relevant to this Complaint, Defendants Cingular Wireless LLC and Cingular Wireless Corporation formerly known as BellSouth Mobility, Inc. (hereinafter collectively referred to as "CINGULAR WIRELESS"), are, respectively, a limited liability corporation and a corporation organized and existing under the laws of the State of Delaware, and were authorized to do business under the laws of the State of Georgia, having their principal place of business at 5565 Glenridge Connector, Atlanta, GA 30342. At all times relevant herein, Cingular Wireless, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas. Defendant is subject to the jurisdiction of this court and venue is appropriate.

29. At all times relevant to this Complaint, Defendant SBC Communications Inc. (hereinafter referred to as "SBC"), is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 175 East Houston Street, San Antonio, Texas 78205, and SBC was conducting its business at all times relevant herein through its affiliate corporations, companies, and partnerships, and its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State. Defendant is subject to the jurisdiction of this court and venue is appropriate

30. At all times relevant to this Complaint, Defendant VoiceStream Wireless Corporation, A/K/A VoiceStream Wireless (hereinafter referred to as "VOICESTREAM"), is a partnership organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Georgia, having its principal place of business at 12920 S.E. 8th Street, Bellvue, Washington, 98006. At all times relevant herein, VoiceStream, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas. Defendant is subject to the jurisdiction of this court and venue is appropriate.

31. At all times relevant to this Complaint, Defendant Southern Telecom Inc., A/K/A Southern Linc (hereinafter referred to as "SOUTHERN"), is a corporation organized and existing under the laws of the State of Georgia, and was authorized to do business under the laws of the State of Georgia, having its principal place of business at 241 Ralph McGill Blvd., NE, Atlanta, Georgia 30308. At all times relevant herein, Southern, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas. Defendant is subject to the jurisdiction of this court and venue is appropriate.

32. At all times relevant to this Complaint, Defendant Powertel Inc., Powertel PCS, Inc. and Powertel/Atlanta, Inc. (hereinafter collectively referred to as "POWERTEL"), are corporations organized and existing under the laws of the State of Delaware, and were authorized to do business under the laws of the State of Georgia, having their principal place of business at 1233 O.G. Skinner Drive,

West Point, GA 31833. At all times relevant herein, Powertel, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas. Defendant is subject to the jurisdiction of this court and venue is appropriate.

33. At all times relevant to this Complaint, Defendant MCI Worldcom Communications Inc., (hereinafter referred to as "WORLDCOM"), is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Georgia, having its principal place of business at 500 Clinton Center Drive, Clinton, MS 39056. At all times relevant herein, Worldcom, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas. Defendant is subject to the jurisdiction of this court and venue is appropriate.

34. At all times relevant to this Complaint, Defendant GTE Wireless, Inc., (A.K.A. Bell Atlantic Mobile, d/b/a Verizon Wireless) (hereinafter referred to as "GTE"), is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Georgia, having its principal place of business at One Verizon Place, Building 1, Atlanta, GA 30001. At all times relevant herein, GTE, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas.

Defendant is subject to the jurisdiction of this court and venue is appropriate.

35. At all times relevant to this Complaint, Defendant Mitsubishi Wireless Communications, Inc. (hereinafter referred to as "MITSUBISHI"), is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Georgia, having its principal place of business at 3805 Crestwood Parkway Suite 350, Duluth, GA 30096. At all times relevant herein, Mitsubishi, through its agents, distributors, servants and/or employees engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business in Atlanta, Georgia and elsewhere in this State, as well as nationally and internationally. Defendant is subject to the jurisdiction of this court and venue is appropriate.

36. At all times relevant to this Complaint, Defendant GlobalStar USA, Inc., (hereinafter referred to as "GLOBALSTAR"), is a corporation organized and existing under the laws of the State of Delaware, and was authorized to do business under the laws of the State of Georgia, having its principal place of business at 1340 Treat Boulevard, Suite 500, Walnut Creek, CA 94596. At all times relevant herein, Globalstar, through its agents, servants, distributors, and/or employees engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas. Defendant is subject to the jurisdiction of this court and venue is appropriate.

37. Defendants John Does I through 50 are as yet unnamed defendants who at all times relevant hereto through their agents, distributors, servants and/or employees were engaged in the design, manufacture, marketing and sale of WHHPs, and transacting business in Atlanta, Georgia and elsewhere in this State.

38. Defendants John Does 51 through 100 are as yet unnamed defendants who at all times relevant hereto through their agents, servants, distributors, and/or employees were engaged in the sale and/or promotion of WHHPs, cellular telephone equipment and transmission services in Atlanta, Georgia and elsewhere in this State, as well as, to cellular telephone owners and users throughout its service areas.

IV. CLASS ACTION ALLEGATIONS

39. The named Plaintiff brings this class action on behalf of herself and all other persons similarly situated for the purpose of asserting the claims alleged on a common basis.

The proposed class is defined as:

a. All purchasers or lessees of WHHPs who are residents of the State of Georgia, and who were residents of the State of Georgia when they purchased or leased a WHHP, who have not been diagnosed with a brain related tumor or cancer of the eye and who were not furnished a headset at the time they purchased or leased their WHHP; and

b. All future purchasers of WHHPs who are residents of the State of Georgia and who have not been diagnosed with a brain related tumor or cancer of the eye.

40. Collectively, all of the above shall be referred to as the "Class".

41. **Numerosity of the class. O.C.G.A. 94-11-23(a).** The Plaintiff is unable to state with precision the exact size of the class noted above but believe that it is so numerous that individual joinder of all of its members is impracticable.

42. **Existence and predominance of common questions of law and fact. O.C.G.A. § 9-11-23(a)(1)-(2).**

Common questions of law and fact exist as to all members of the Class. The common questions predominate over any questions affecting only individual members of the Class. These common legal and factual questions include, but are not limited to, the following:

a. whether, during any period, the Defendants, acting individually or collectively, failed to conduct appropriate, reasonable and adequate testing of WHHPs to determine the association between RFR and biological effects and the risk to human health arising therefrom;

b. whether, during any period, the Defendants acting individually or collectively, failed to conduct appropriate, reasonable and adequate research to determine the association between RFR and harmful biological effects.

c. whether, during any period, the Defendants acting individually or collectively, failed to warn or otherwise inform the Plaintiffs and others similarly situated of the association between RFR and biological effects and the risks to human health arising therefrom.

d. whether, during any period, the Defendants acting individually or collectively, failed to provide headsets which would have eliminated, reduced or minimized the biological effects from RFR and its risk to human health arising therefrom.

43. **Typicality of claims and Adequacy of Representation. O.C.G.A. § 9-11-23.** Plaintiff is an adequate representative of the class and her interests do not conflict, but are identical with the interests of the members of the Class she seeks to represent. Plaintiff's attorneys are qualified, experienced and generally able to conduct this litigation. The claims being asserted by Plaintiff are typical

of those of the Class. She intends to prosecute this action vigorously for the benefit of the Class. The interests of the members of the Class will be fairly and adequately protected by Plaintiff and her counsel.

44. **Superiority. O.C.G.A. § 9-11-23.** A class action is superior to other available methods for the fair and efficient adjudication of this litigation. Individual litigation is both impracticable and unnecessary under the model proposed herein. Class members are all identically united in the risk of injury to which they are exposed. No individual issues of injury exist, let alone predominate in this case, because membership in the Class is premised only upon purchase or lease of a WHHP without a headset. In all respects, individual litigation would identically mirror the class action litigation. Individual litigation would be unduly burdensome to the courts and to the claimants. Individual litigation further presents a potential for inconsistent or contradictory judgments and would increase delay and expense to all parties in the court system in resolving the complex issues of the case. This delay and expense would be particularly inefficient in this case, where the risk of injury to which claimants are exposed is identical. The class action device proposed herein provides the benefits of a single adjudication, economics of scale and comprehensive supervision by a single court of thousands of claims which are identical in all respects. In every respect, class action is the best method for the fair and efficient adjudication of this litigation. Notice of the pendency and of any resolution of this class action can be provided to members of the Class by publication and use of the broadcast media.

V. FACTS COMMON TO ALL COUNTS

45. Service providers are an integral component of the WHHP industry, without which WHHPs could not be used.

46. Defendants Verizon, Sprint, Nextel, AT&T, Verizon, Cingular, SBC, Southern, Powertel, Worldcom, GTE, GlobalStar and VoiceStream ("Cell Phone Carriers") are providers of cellular telephone service, and/or control or wholly own subsidiaries which are providers of cellular telephone service.

47. Defendant Cell Phone Carriers are granted licenses by the FCC to broadcast wireless signals on specific frequency bands to provide cellular telephone service to consumers.

48. Each manufacturer constructs WHHPs to fit the different specifications of the Cell Phone Carriers.

49. Each Cell Phone Carrier provides manufacturers and/or sellers of WHHPs with specifications based on its specific frequency band. The specifications of the battery and circuitry for all WHHPs in a Cell Phone Carrier's network are determined by the Cell Phone Carrier's license and frequency information granted by the FCC.

50. Each time a WHHP user makes or receives a call a wireless signal is transmitted from the WHHP antenna to the nearest cell tower or from the nearest cell tower to the WHHP antenna, thereby exposing the WHHP user to RFR.

51. Land lines also play a central role in the operation and use of WHHPs. Based upon the license granted by the FCC to and the frequency specifications provided to sellers and/or manufacturers of WHHPs, the Defendant Cell Phone Carriers create a network by which the wireless signal is transferred to land lines and the call is sent to a receiver or sent to the cell phone customer.

52. While placing and receiving calls, the named Plaintiff held her WHHP in the manner for which WHHPs were designed and intended to be used so that the receiver was resting against her ear ("Customary Position"), the manner in which other similarly situated Class Members customarily use their WHHPs.

53. Each time the named Plaintiff used her WHHP in the Customary Position, the antenna was located next to her head.

54. Each time the named Plaintiff used her WHHP, she was exposed to RFR which emanated from the antenna, thereby subjecting her to RFR and, in the absence of a headset, to RFR's biological effects and the risk to human health arising therefrom.

55. The health risk created by the Plaintiff's use of her WHHPs is identical to the risk to which all other members of the Class were exposed.

56. Scientific and medical research, published in peer reviewed literature, has demonstrated biological injury from exposure to RFR within the radio frequency band of 300 megahertz to 2.4 gigahertz.

57. Appropriately designed headsets when properly used eliminate the WHHP users' exposure to RFR. Headsets to be used in conjunction with a WHHP have been commercially available at all relevant times.

58. Defendants have marketed headsets as an accessory at an additional cost.

59. Defendants were aware or should have been aware of numerous studies and experiments that demonstrated the health risks and biological effects of RFR dating back to the late 1920s.

60. As research and studies evolved over the ensuing decades, it was found, among other things, that animal research demonstrated physical injury and/or adverse biological effects as a result of varying levels of RFR.

61. That during this same period of time research was also forthcoming as to the risk to human health posed by exposure to RFR.

62. By the early 1960's it was well established in the scientific and medical communities that RFR is efficiently absorbed into human tissue and is capable of producing biological injury.

63. It was equally well known in the scientific and medical community by that time that an antenna is the most efficient means of depositing RFR into the human body and penetrating human tissue and that the temporal lobe of the brain was the most sensitive area of the body to this type of radiation.

64. Medical and scientific inquiry and research into the harmful biological effects of RFR continued unabated from the 1960's to the present day. Throughout this period dozens of peer reviewed research papers were published which, individually and collectively, raised serious and credible questions regarding whether the RFR to which WHHP users were and are exposed posed a threat to their health.

65. The Defendants knew or, by the application of reasonable, developed human skill and foresight, should have known of the unreasonably dangerous characteristics of WHHPs because such knowledge was, at all times relevant to the claims herein, part of the "state of the art" body of knowledge in the relevant scientific and medical communities.

66. At all times relevant to the claims herein, the Defendants failed to conduct adequate testing and research regarding the dangerous characteristics of WHHPs. Not only did the Defendants fail to engage in pre-market testing of WHHPs, but after introducing WHHPs into the marketplace, the Defendants continued to fail to fulfill their ongoing obligation to conduct adequate testing and research regarding the dangerous characteristics of WHHPs.

67. Throughout this entire period the Defendants, acting individually and collectively through their respective trade associations, took steps to suppress, discredit and/or minimize this emerging science.

68. Throughout this same period the Defendants, acting individually and collectively through their respective trade associations, took steps to ensure that they would be

free to manufacture and mass market WHHPs to the consuming public, free from the constraints of any reasonable and necessary safety standards regulating RFR exposure. They accomplished this by obtaining and exercising dominance and control over the American National Standards Institute ("ANSI") Committee responsible for developing safety standards for RFR emitting devices.

69. In 1966, long before Defendants began producing WHHPS, ANSI adopted an RFR exposure limit of 10 mW/cm^2 which was identified as ANSI Standard C95.1-1966 ("ANSI-1966"). However, this standard was based solely on the *thermal* effects associated with RFR and did not contemplate or consider the possibility that RFR exposure could give rise to non-thermal biological injury and subsequent adverse health effects. Nevertheless, prior to 1989, the Defendants relied upon this irrelevant ANSI Standard to make unfounded and improper representations to the consuming public, including the Plaintiff, that WHHPs were safe for their intended use without the use of a headset.

70. In 1989 at an ANSI meeting, representatives of the WHHP industry, including the Defendants herein, sought an exclusion for WHHPs from ANSI-1966. The Defendants' proposal would have exempted from ANSI-1966 all devices using less than seven (7) watts of power. Such an exclusion would have effectively exempted all WHHPs from ANSI-1966. At this initial meeting, the efforts of the Defendants and others to achieve the exclusion failed and the vote for the exclusion was defeated.

71. Approximately one month later a smaller group of the ANSI RFR Safety Standard Committee met and the exclusion clause was again pressed at the urging of the Defendants. On this occasion, the proposal was approved and WHHPs were exempted from ANSI-1966. As a consequence of this action, WHHPs were aggressively marketed thereafter without any safety standard to protect

Plaintiff and other foreseeable users from the harmful effects of RFR exposure.

72. In the early 1990's, after successfully contriving to exempt themselves from ANSI regulation and as credible concerns continued to surface regarding the safety of WHHPs, the Defendants, individually and through their trade associations, undertook with great public fanfare to find scientific inquiry into the potential health hazards posed by the use of WHHPs. When this industry-funded research failed to corroborate the industry's reckless and premature claims of safety, and, in fact, presented new evidence of potential health concerns, the industry responded by terminating the research funding and publicly disparaging, suppressing and minimizing the results.

73. Despite their knowledge of the literature, research and the industry's own studies, the Defendants continued wrongfully to maintain that WHHPs posed no threat to human health despite mounting abundant evidence to the contrary.

74. At all relevant times, the biological injury caused by low level RFR of WHHPs which, in turn, gives rise to a risk to the users' health, was fully known and appreciated by the Defendants. At all relevant times, the Defendants should have and easily could have minimized, reduced and or eliminated this health risk by acknowledging its existence and providing to each purchaser of WHHPs a headset with appropriate instructions for use. The Defendants negligently and recklessly failed and/or refused to take this simple step to reduce the health risks to consumers for fear that such action would inhibit their ability to mass market WHHPs to the consuming public, including the Plaintiff and others similarly situated.

75. On January 26, 1993, Defendant Motorola announced to the news media, which subsequently reported to the public, that "thousands of studies" had already shown

cellular phones were safe. This statement was fraudulent, deceitful, and misleading.

76. On July 16, 1993, in furtherance of its dishonest campaign to assure the consuming public of the "safety" of WHHP's, the Cellular Telecommunications Industry Association (CTIA), representing many of the named Defendants, held a press conference and issued a report entitled "Safety Update-Fast Facts: Portable Cell Phone Safety," which, in bold print, deceptively stated, the following: **"Rest assured. Cellular telephones are safe!"** The report further stated that cell phones fall within the safety standards of the Federal Communications Commission (FCC). However, the Defendants fraudulently and deceitfully omitted the fact that the FCC had declared that it does *not* consider itself the "expert agency" for evaluating health effects.

77. This industry deception prompted Elizabeth Jacobson, Deputy Director for Science at the Center for Devices and Radiological Health, Food and Drug Administration, on July 19, 1993 to send a letter to CTIA president Thomas Wheeler, which clearly questioned and challenged the misleading statements made by the Defendants to the public regarding the "safety" of WHHPs. In pertinent part, that letter stated:

> "I am writing to let you know that we were concerned about two important aspects of your press conference on July 16 concerning the safety of cellular phones, and to ask that you carefully consider the following comments when you make future statements to the press.
>
> First, both the written press statements and your verbal

comments during the conference seemed to display an unwarranted confidence that these products will be found to be absolutely safe. In fact, the unremittingly upbeat tone of the press packet strongly implies that there can be no hazard, leading the reader to wonder why any further research would be needed at all. (Some readers might also wonder how impartial the research can be when its stated goal is "a determination to reassure consumers," and when the research sponsors predict in advance that 'we expect the new research to reach the same conclusion, that the cellular phones are safe."). . . .

We are even more concerned that your press statements did not accurately characterize the relationship between CTIA and the FDA. . . . [S]ince it is not yet clear whether we will help to direct the research program, it is premature to state that we will credential the research.

To sum up, Mr. Wheeler, our role as a public health agency is to protect health and safety, not to "reassure consumers.". I

> think it is very important that the public understand where we stand in evaluating the possibility that cellular phones might pose a health risk. . . .

78. In or about late 1993, or early 1994, the cell phone industry, including the named Defendants, through CTIA, organized a committee to prepare a manual for public consumption discussing "responsible" WHHP use. After receiving a draft of the manual, Thomas Wheeler, president of CTIA, sent a memorandum to the drafting committee expressing his concerns over certain language in the draft which acknowledged and/or implied that the use of WHHPs could pose health risks. Mr. Wheeler's memorandum suggested significant substantive deletions from the draft, which are set forth. The committee deleted the offending material set forth here in bold typeface:

> Do not operate your transportable cellular telephone when holding the antenna, or when any person is within 4 inches (10 centimeters) of the antenna. **Otherwise you may impair call quality, may cause your phone to operate at a higher power level than is necessary, and may expose that person to RF energy in excess of the levels established by the updated ANSI Standard.**
>
> **If you want to limit RF exposure even further, you may choose to control the duration of your calls or**

> **maintain a distances from the antenna of more than 4 inches (10 centimeters).**
>
> For best call quality, keep the antenna free from obstructions and point it straight up."

79. At some point subsequent to, and as a direct consequence of the filing of other proceedings raising concerns about biological injury from RFR, the Defendants (or some of them) began to provide to purchasers (or lessees) of WHHPs a copy of the U.S. Food and Drug Administration's ("FDA") "Update on Mobile Phones" (dated 10/2000). This document was inserted by the Defendants into the marketing package for newly purchased WHHPs.

80. The FDA's "Update on Mobile Phones" instructs the consuming public to the following effect:

> **The U.S. Food and Drug Administration's Center for Devices and Radiological Health Consumer Update on Mobile Phones.**
>
> **...Why the concern?**
>
> Mobile phones emit low levels of radio frequency energy (i.e., radio frequency radiation) in the microwave range while being used. They also emit very low levels of radio frequency energy (RF), considered non-significant, when in the stand-by mode. It is well known that high levels of RF can produce biological damage through heating effects (this is how your microwave oven is able to cook food). However, *it is not known whether, to what extent, or through what mechanism, lower levels of RF might cause adverse health effects as well. Although some research has been done to address these questions, no clear picture of the biological effects of this type of radiation has emerged to date.*

Thus, the available science does not allow us to conclude that mobile phones are absolutely safe, or that they are unsafe. (Emphasis added)....

How much evidence is there that hand-held mobile phones might be harmful?

Briefly, there is not enough evidence to know for sure, either way: however, research efforts are on-going. The existing scientific evidence is conflicting and many of the studies that have been done to date have suffered from flaws in their research methods.

...What is FDA's role concerning the safety of mobile phones?

Under the law, FDA does not review the safety of radiation emitting consumer products such as mobile phones before marketing, as it does with new drugs or medical devices...

Although the existing scientific data do not justify FDA regulatory actions at this time, FDA has urged the mobile phone industry to take a number of steps to assure public safety. The agency has recommended that the industry:

- support needed research into possible biological effects of RF of the type emitted by mobile phones;
- design mobile phones in a way that minimizes any RF exposure to the user that is not necessary for device function; and

- cooperate in providing mobile phone users with the best possible information on what is known about possible effects of mobile phone use on human health.

81. Plaintiff and others similarly situated were and continue to be misinformed, misled and deceived by the Defendants into believing that WHHPs are safe and pose no threat to human health.

82. Defendants at all relevant times have controlled the design, assembly, platform for usage, manufacture, marketing sales and provision of service of WHHPs which have been widely advertised by the Defendants as posing no threat to human health.

83. The product warnings in effect during the period relevant to this Complaint were both substantively and graphically wholly inadequate to alert Plaintiff and those similarly situated as to the risks associated with WHHP use.

84. Defendants have never adequately informed the public about the risk of biological injury which poses a health risk to WHHP users or of the fact that the risk of injury can differ with the amount of use and the sensitivity of the user.

VI. CLAIMS FOR RELIEF

COUNT I

STRICT PRODUCT LIABILITY - FAILURE TO WARN

85. The Plaintiff on behalf of herself, and others similarly situated, hereby incorporates by reference, as if

fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further alleges as follows.

86. Defendants are manufacturers, suppliers and/or service providers of WHHPs and are engaged in the design, manufacture, sale and provision of service, of WHHPs.

87. The WHHPs purchased by Plaintiff and others similarly situated were placed in the stream of commerce, sold and activated by the Defendants in a defective and unreasonably dangerous condition in that the WHHPs failed to include a proper warning regarding all possible adverse health effects associated with the use of WHHPs and the harmful effects of the radiation emitted from WHHPs to the Plaintiff and those similarly situated. The other Defendants, in like manner, failed to include a proper warning to the other members of the Class regarding all possible adverse health effects associated with the use of WHHPs and the harmful effects of the radiation emitted from WHHPs.

88. The WHHPs manufactured and/or supplied by the Defendants reached the Plaintiff and others similarly situated without any substantial change in their condition and were in that same condition when used by Plaintiff and others similarly situated.

89. Defendants Motorola, Ericsson, Sprint, and Powertel also failed to warn Plaintiff and others similarly situated that other methods for using WHHPs were available, such as, but not limited to, a headset which would have prevented the adverse health effects associated with the use of WHHPs. The other Defendants, in like manner, also failed to warn the other members of the Class that other methods for using WHHPs were available, such as, but not limited to, a headset which would have prevented the adverse health effects associated with the use of WHHPs.

90. The Defendants knew or, by the application of reasonable, developed human skill and foresight, should

have known of the unreasonably dangerous characteristics of the WHHPs because such knowledge was, at all times relevant to the claims herein, part of the "state of the art" body of knowledge in the relevant scientific and medical communities.

91. At all times relevant to the claims herein, the Defendants failed to conduct adequate testing and research regarding the dangerous characteristics of WHHPs. Not only did the Defendants fail to engage in pre-market testing of WHHPs, but after introducing WHHPs into the marketplace, the Defendants continued to fail to fulfill their ongoing obligation to conduct adequate testing and research regarding the dangerous characteristics of WHHPs.

92. The WHHPs purchased by the Plaintiff and others similarly situated were defective and unseasonably dangerous due to inadequate warnings or instructions because, after Defendants knew or should have known of the risk of injury from its use, Defendants failed to provide adequate warnings or instructions to Plaintiff and others similarly situated as herein alleged. Defendants continued to aggressively promote the product and failed to provide a headset to Plaintiff and others similarly situated. The other Defendants, in like manner, failed to provide adequate warnings or instructions to the other members of the Class.

93. The failure to provide a warning or instruction as herein alleged or to provide a headset, made WHHPs unreasonably dangerous.

94. The product warnings in effect during the period relevant to this Complaint were both substantively and graphically wholly inadequate to alert Plaintiff and those similarly situated as to the risks associated with WHHP use.

95. Defendants have never adequately informed the public about the risk of biological injury which poses a health risk to WHHP users or of the fact that the risk of injury can differ with the amount of use and the sensitivity of the user.

96. As a direct and proximate result of the defective and unreasonably dangerous condition of the WHHP as alleged above, Plaintiff, and others similarly situated, was and continues to be exposed to a health risk.

97. At all times relevant hereto, the Defendants actually knew of the defective nature of WHHPs as herein set forth and continued to design, manufacture, market, sell and provide service for WHHPs so as to maximize sales and profits at the expense of public health and safety. At all relevant times the Defendants, could have eliminated or significantly mitigated the health risk alleged herein by acknowledging its existence and providing purchasers such as the Plaintiff with a headset with appropriate warnings and instructions for use. The Defendants' abject refusal or failure to so act was motivated solely by their desire to maximize sales and profits at the expense of the users' health.

WHEREFORE, Plaintiff prays for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for each Class Member;

b. Reimbursing Plaintiff and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For punitive damages to Plaintiff and other members of the Class;

f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

g. For costs, attorney fees, and legal pre-judgment interest; and

h. An Order certifying the Class and appointing the Plaintiff and her counsel to represent the Class.

COUNT II

STRICT PRODUCT LIABILITY

DESIGN OR MANUFACTURING DEFECT

98. The Plaintiff on behalf of herself, and others similarly situated, hereby incorporate by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further alleges as follows.

99. The WHHPs designed, manufactured and/or supplied by Defendants Motorola, Ericsson, Sprint, and Powertel were defective in design and or manufacture because when they were placed in the stream of commerce they failed to contain or incorporate a headset to eliminate or reduce the users' exposure to RFR. The WHHPs sold or supplied by the other Defendants to the other members of the Class also failed to include or incorporate a headset.

100. The Defendants knew or, by the application of reasonable, developed human skill and foresight, should have known of the unreasonably dangerous characteristics of the WHHPs because such knowledge was, at all times relevant to the claims herein, part of the "state of the art" body of knowledge in the relevant scientific and medical communities,

101. At all times relevant to the claims herein, the Defendants failed to conduct adequate testing and research regarding the dangerous characteristics of WHHPs. Not only did the Defendants fail to engage in pre-market testing of WHHPs, but after introducing WHHPs into the marketplace, the Defendants continued to fail to fulfill their ongoing

obligation to conduct adequate testing and research regarding the dangerous characteristics of WHHPs.

102. The WHHPs reached Plaintiff and others similarly situated without substantial change in their condition and were in that same condition at the time of the use alleged.

103. The design or manufacturing defect alleged herein rendered the Plaintiff's WHHPs unreasonably dangerous when used in the manner intended by the Defendants and as a result, Defendants Motorola, Ericsson, Sprint, and Powertel are strictly liable to the Plaintiff and others similarly situated as are the other Defendants to the other members of the Class.

104. At the time that the WHHPs left the Defendants' possession, the WHHPS were unreasonably dangerous to the Plaintiff and others similarly situated and the Defendants had a safe alternative or modification, which was economically feasible.

105. As a direct and proximate result of the defective and unreasonably dangerous condition of WHHPS as manufactured and/or supplied by Defendants, Plaintiff and others similarly situated were exposed to a health risk.

106. At all times relevant hereto, Defendants actually knew of the defective nature of WHHPs as herein set forth and continued to design, manufacture, market, sell and provide service for WHHPs so as to maximize sales and profits at the expense of public health and safety. At all relevant times Defendants Motorola, Ericsson, Sprint and Powertel as well as the other Defendants, could have eliminated or significantly mitigated the health risk alleged herein by acknowledging its existence and providing purchasers such as the Plaintiff with a headset with appropriate warnings and instructions for use. The Defendants' abject refusal or failure to so act was motivated solely by their desire to maximize sales and profits at the expense of the users' health.

WHEREFORE, Plaintiff prays for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff and for each Class Member;

b. Reimbursing Plaintiff and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For punitive damages to Plaintiff and other members of the Class;

f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

g. For costs, attorney fees, and legal pre-judgment interest; and

h. An Order certifying the Class and appointing the Plaintiff and her counsel to represent the Class.

COUNT III

BREACH OF IMPLIED WARRANTIES

107. The Plaintiff on behalf of herself, and others similarly situated, hereby incorporates by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further alleges as follows.

108. Under Georgia common and statutory law, a warranty of merchantability is implied in all sales transactions. A warranty of merchantability is a warranty

implied by law that a product is fit for the ordinary use for which it is used, is properly labeled and conforms to the representations made about it. See O.C.G.A. § 11-2-314.

109. At the time Defendants marketed, sold and distributed WHHPs for use by Plaintiffs and others similarly situated, Defendants Motorola, Ericsson, Sprint, and Powertel knew of the use for which WHHPs were intended and impliedly warranted the product to be of merchantable quality and safe and fit for such use.

110. The other Defendants, in like manner, impliedly so warranted WHHPs to members of the Class who purchased or leased WHHPs from these other manufacturers and/or sellers.

111. Plaintiff and others similarly situated, used and/or operated the WHHPs as they were intended to be used and in the manner foreseeable by Defendants.

112. Defendants Motorola, Ericsson, Sprint and Powertel breached said warranty, as did the other Defendants to those similarly situated in that the WHHPs created a health risk and were unfit for ordinary and intended use as described above in failing to include a headset which shielded or protected users from RFR.

113. As a direct and proximate result of the Defendants' breach, Plaintiff, and others similarly situated, were subjected to a health risk.

WHEREFORE, Plaintiff prays for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff and for each Class Member;

b. Reimbursing Plaintiff and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

f. For costs, attorney fees, and legal pre-judgment interest; and

g. An Order certifying the Class and appointing the Plaintiff and her counsel to represent the Class.

COUNT IV

NEGLIGENCE

114. The Plaintiff on behalf of herself, and others similarly situated, hereby incorporates by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further allege as follows.

115. Defendants are manufacturers, suppliers and/or service providers of WHHPs and are engaged in the design, manufacture, sale and provision of service of WHHPs.

116. Defendants owed the Plaintiff and others similarly situated to whom it sold or leased a WHHP the duty of care to design, manufacture, test, market, distribute and sell WHHPs with appropriate instructions and warnings in a reasonable and safe manner. The other Defendants owed an identical duty to those members of the class to whom they sold or leased WHHPs.

117. Defendants knew or should have known of the biological injury and the resulting health risks associated with RFR emissions from WHHPs.

118. At all times during the design, manufacture, testing, marketing, sale and provision of service of WHHPs, it was reasonably foreseeable to Defendants that individuals, including Plaintiff, who used WHHPS would be exposed to levels of RFR which posed health risks.

119. The Defendants knew or, by the application of reasonable, developed human skill and foresight, should have known of the unreasonably dangerous characteristics of the WHHPs because such knowledge was, at all times relevant to the claims herein, part of the "state of the art" body of knowledge in the relevant scientific and medical communities.

120. At all times relevant to the claims herein, the Defendants failed to conduct adequate testing and research regarding the dangerous characteristics of WHHPs. Not only did the Defendants fail to engage in pre-market testing of WHHPs, but after introducing WHHPs into the marketplace, the Defendants continued to fail to fulfill their ongoing obligation to conduct adequate testing and research regarding the dangerous characteristics of WHHPs.

121. Defendants Motorola, Ericsson, Sprint, and Powertel knew or should have known that Plaintiff and others similarly situated would be subjected to a health risk and suffer biological injury as a result of their failure to exercise ordinary and reasonable care. The other Defendants knew or should have known that others similarly situated to the Plaintiff would be subjected to a health risk and suffer biological injury as a result of their failure to exercise ordinary and reasonable care.

122. Defendants Motorola, Ericsson, Sprint, and Powertel breached their duty of care to the Plaintiff and others similarly situated by: failing to conduct adequate and appropriate scientific research and testing on the issue of adverse health effects from exposure to WHHP generated RFR; negligently misrepresenting to the consuming public, including the Plaintiff herein, that WHHPs posed no threat to

human health and were "safe" for intended use; suppressing or disparaging scientific evidence suggesting a potential for harm to human health from WHHP RFR; failing to provide headsets and instructions encouraging the use thereof to purchasers and lessees of WHHPs; and failing to warn purchasers and lessees of the potential health risks arising from using a WHHP without a headset. In like manner, the other Defendants breached their duty to the other members of the Class.

123. As a direct and proximate result of Defendants' negligence, Plaintiff, and others similarly situated, were exposed to a health risk.

124. At all times relevant, Plaintiff, and others similarly situated, acted with due care and without negligently contributing to the health risk or biological injury alleged herein.

125. At all times relevant hereto, the Defendants actually knew of the defective nature of WHHPs as herein set forth and continued to design, manufacture, market, sell and provide service for WHHPs so as to maximize sales and profits at the expense of public health and safety. At all relevant times Defendants Motorola, Ericsson, Sprint and Powertel, as well as the other Defendants, could have eliminated or significantly mitigated the health risk alleged herein by acknowledging its existence and providing purchasers such as the Plaintiff with a headset with appropriate warnings and instructions for use. The Defendant's abject refusal or failure to so act was motivated solely by their desire to maximize sales and profits at the expense of the users' health.

WHEREFORE, Plaintiff prays for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff and for each Class Member;

b. Reimbursing Plaintiff and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For punitive damages to Plaintiff and other members of the Class;

f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

g. For costs, attorney fees, and legal pre-judgment interest; and

h. An Order certifying the Class and appointing the Plaintiff and her counsel to represent the Class.

COUNT V

FRAUD

126. The Plaintiff on behalf of herself, and others similarly situated, hereby incorporates by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further allege as follows.

127. Defendants Motorola, Ericsson, Sprint and Powertel made false representations of material facts to the public and to Plaintiff. The Defendants led the public and the Plaintiff to believe under false pretenses that WHHPs were safe and did not create a health risk or cause biological injury.

128. The remaining Defendants made false representations of material facts to other members of the Class and led them to believe under false pretenses that

WHHPs were safe and did not create a health risk or cause biological injury.

129. Defendants knew these representations were false or made these representations with such reckless disregard for the truth that the falsity can be imputed to them.

130. Defendants were acting at all times relevant within the scope of their business for their own economic and pecuniary benefit.

131. Defendants made these false misrepresentations in order to defraud the public, other members of the Class, and therefore Plaintiff. Defendants committed fraud by, among other things: (1) failing to adequately test WHHPs and failing to inform the public that such WHHPs did not meet safety standards; (2) misstating to Plaintiff and others similarly situated through advertising and testimonials that WHHPs are safe; and (3) otherwise committing fraud which upon information and belief will be proven through documentary evidence, which is in the possession of the Defendants.

132. Plaintiff and others similarly situated, justifiably relied on the false representations made by the Defendants, and as a direct result suffered damages.

133. As a direct and proximate result of Defendants' fraud, Plaintiff and others similarly situated were exposed to a health risk and sustained biological injuries.

134. At all times relevant hereto, the Defendants actually knew of the defective nature of WHHPs as herein set forth and continued to provide service for, design, manufacture, market and sell WHHPs so as to maximize sales and profits at the expense of public health and safety. Defendants' conduct is such as to establish that their actions were a result of fraud, evil motive, actual malice, and the conscious and deliberate disregard of foreseeable health risk and biological injury to Plaintiff and others similarly

situated. Therefore, Plaintiff and others similarly situated are entitled to punitive damages.

WHEREFORE, Plaintiff prays for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff and for each Class Member

b. Reimbursing Plaintiff and each for Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For punitive damages to Plaintiff and other members of the Class;

f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

g. For costs, attorney fees, and legal pre-judgment interest; and

h. An Order certifying the Class and appointing the Plaintiff and her counsel to represent the Class.

COUNT VI

FRAUD BY CONCEALMENT

135. The Plaintiff on behalf of herself, and others similarly situated, hereby incorporate by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further allege as follows.

136. Defendants Motorola, Ericsson, Sprint and Powertel intentionally concealed their knowledge of material facts from the public and the Plaintiff. The Defendant intentionally led the public and the Plaintiff to believe under false pretenses that WHHPs were safe and did not create a health risk or cause biological injury.

137. The remaining Defendants intentionally concealed their knowledge of material facts to other members of the Class and led them to believe under false pretenses that WHHPS were safe and did not create a health risk or cause biological injury.

138. Defendants were acting at all times relevant within the scope of their business for their own economic and pecuniary benefit.

139. Defendants intentionally concealed their knowledge of the health risks and biological injuries caused by RFR emitted by WHHPs in order to defraud the public, other members of the Class, and the Plaintiff. Defendants committed fraud by, among other things: (1) intentionally concealing evidence, as alleged in this Complaint, that would have demonstrated to the Plaintiff; and others similarly situated, that WHHPs are not safe for use; (2) as alleged throughout this Complaint, intentionally failing to warn Plaintiff, and others similarly situated, of research that indicated an association between RFR from WHHPs and health risks and biological injury; and (3) otherwise committing fraud which, upon information and belief will be proven through documentary evidence, which is in the possession of the Defendants.

140. As a direct and proximate result of Defendants' concealment, Plaintiff and other similarly situated were exposed to a health risk and sustained biological injuries.

141. At all times relevant hereto, the Defendants actually knew of the defective nature of WHHPs as set forth herein and continued to provide service for, design,

manufacture, market and sell WHHPs so as to maximize sales and profits at the expense of public health and safety. Defendants' conduct is such as to establish that their actions were a result of fraud, evil motive, actual malice, and the conscious and deliberate disregard of foreseeable health risk and biological injury to Plaintiff and others similarly situated. Therefore, Plaintiff and others similarly situated are entitled to punitive damages.

WHEREFORE, Plaintiff prays for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff and for each Class Member;

b. Reimbursing Plaintiff and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For punitive damages to Plaintiff and other members of the Class;

f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warnings;

g. For costs, attorney fees, and legal pre-judgment interest; and

h. An Order certifying the Class and appointing the Plaintiff and her counsel to represent the Class.

COUNT VII

CIVIL CONSPIRACY

142. The Plaintiff on behalf of herself, and others similarly situated, hereby incorporate by reference, as if fully set forth herein, all of the aforegoing paragraphs of the Complaint, and further allege as follows.

143. At all times relevant and to the present time, Defendants formed confederacies, trade associations or affiliations (CTIA, Telecommunications Industry Association ("TIA") and Wireless Telephone Research ("WTR")) and entered into agreements and/or tacit understandings to jointly, and in conspiracy with each other, market, in disregard of the obligations they owed the consuming public, through warranties and otherwise, unreasonably dangerous and defective WHHPs. They conducted their marketing by improper and wrongful means, including suppressing information related to the health risks and biological injury associated with RFR emissions from WHHPs, and placing into the stream of commerce dangerously defective WHHPs. In so doing, Defendants defrauded Plaintiff, and others similarly situated, and failed to warn Plaintiff and others similarly situated, of the biological injury and resulting health risks associated with WHHPs.

144. Defendants acted collectively in:

a. marketing, producing and promoting the use of WHHPs without proper tests or warnings and without regard to the dangerous RFR emitted therefrom and its effects upon Plaintiff and others similarly situated;

b. suppressing, discouraging and/or retarding appropriate

research, testing, regulation and public dissemination of information concerning RFR emissions and the effects those emissions would have on the Plaintiff and others similarly situated; and

c. ignoring, disparaging, or misleading the public about medical and scientific data available to them which clearly indicated that RFR emissions from WHHPs create biological injury and resulting health risks.

145. Through the foregoing course of conduct, Defendants conspired to breach the warranties and commit the tortious acts described in this Complaint, in furtherance of their agreement or understanding to promote and market WHHPs.

146. The Defendants knew or, by the application of reasonable, developed human skill and foresight, should have known of the unreasonably dangerous characteristics of the WHHPs because such knowledge was, at all times relevant to the claims herein, part of the "state of the art" body of knowledge in the relevant scientific and medical communities.

147. At all times relevant to the claims herein, the Defendants failed to conduct adequate testing and research regarding the dangerous characteristics of WHHPs. Not only did the Defendants fail to engage in pre-market testing of WHHPs, but after introducing WHHPs into the marketplace, the Defendants continued to fail to fulfill their ongoing obligation to conduct adequate testing and research regarding the dangerous characteristics of WHHPs.

148. Defendants were aware of the health risks and potential biological injury to those exposed to RFR emissions from WHHPs prior to the use of same by Plaintiff and others similarly situated.

149. At all relevant times, notwithstanding their knowledge of the health risks of RFR emission from WHHPs, Defendants collectively thwarted efforts to regulate and control RFR emissions of WHHPs.

150. Notwithstanding their extensive knowledge of the health risks of RFR emissions from WHHPs, Defendants continued to promote WHHPs as appropriate for use and, in so doing, defrauded the Plaintiff and others similarly situated into believing WHHPs are safe without the use of a headset.

151. Defendants, acting collectively, to this very day, have failed and continue to fail to properly instruct and warn consumers about the health risks and biological injury associated with RFR emissions from WHHPs, notwithstanding Defendants' knowledge of same.

152. At all relevant times, notwithstanding their knowledge of the health risks of RFR emissions from WHHPs, Defendants continued, and continue to this very day, to place into the stream of commerce dangerous and defective WHHPs without providing a headset.

153. Defendants' collective, conspiratorial and tortious activities were knowingly and purposefully designed for their own economic and pecuniary benefit and were performed in furtherance of Defendants' respective and joint business interests.

154. As a direct and proximate result of Defendants' conduct, Plaintiff and others similarly situated are being and will be exposed to a health risk due to the failure of Defendants to provide a headset.

155. At all times relevant hereto, the Defendants actually knew of the defective nature of WHHPs, as herein set forth, and continued to design, manufacture, market, sell and/or provide service for WHHPs so as to maximize sales

and profits at the expense of public health and safety. Defendants' conduct is such as to establish that their actions were a result of fraud, evil motive, actual malice, and the conscious and deliberate disregard of foreseeable health threats to Plaintiff and others similarly situated. Plaintiff and others similarly situated are entitled to damages, punitive and compensatory.

WHEREFORE, Plaintiff prays for the following relief:

a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff and for each Class Member;

b. Reimbursing Plaintiff and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;

c. Providing each Class member who has not been so provided, a WHHP that can be used with a headset;

d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;

e. For punitive damages to Plaintiff and other members of the Class;

f. For injunctive relief preventing the future sale of WHHPS without headsets and appropriate instructions and warnings;

g. For costs, attorney fees, and legal pre-judgment interest; and

h. An Order certifying the Class and appointing the Plaintiff and her counsel to represent the Class.

VII. JURY DEMAND

Plaintiff hereby demands a trial by jury for such issues as may be tried by a jury.

Respectfully submitted this 8 date of June, 2001.

WEINSTOCK & SCAVO, P.C.

s/Michael Weinstock
Michael Weinstock
Ga. Bar No. 746454
Richard Capriola
Ga. Bar No. 108880
Jan P. Cohen
Ga. Bar No. 174337
Daniel P. Sinaiko
Ga. Bar No 648848

Attorneys for Plaintiff
Weinstock & Scavo, P.C.
3405 Piedmont Rd., N.E.
Suite 300
Atlanta, GA 30305
(404) 231-3999

No. 05-207

Supreme Court, U.S.
FILED
SEP 19 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CELLCO PARTNERSHIP, *et al.*,
Petitioners,

v.

J. DOUGLAS PINNEY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

KENNETH A. JACOBSEN
LAW OFFICES OF
KENNETH A. JACOBSEN
22 West Front Street
Media, Pennsylvania 19063
(610) 566-7930

JOSEPH A. O'KEEFE
O'KEEFE & SHER, P.C.
15019 Kutztown Road
Kutztown, Pennsylvania 19530
(610) 683-0771

Counsel for Respondent
Francis J. Farina

MICHAEL WEINSTOCK
RICHARD CAPRIOLA
MATTHEW W. CARLTON
Weinstock & Scavo, P.C.
3405 Piedmont Road, N.E.
Suite 300
Atlanta, Georgia 30305
(404) 231-3999

Counsel for Respondent
Riedy Gimpelson

HARLEY THOMAS HOWELL
Counsel of Record
WILLIAM F. GATELY
HOWELL & GATELY
One Charles Center, 19th Floor
100 North Charles Street
Baltimore, Maryland 21201
(410) 649-1103

Counsel for Respondents
J. Douglas Pinney and
Patricia S. Colonnel

H. RUSSELL SMOUSE
GLENN E. MINTZER
LAW OFFICES OF PETER G.
ANGELOS, P.C.
One Charles Center
100 North Charles Street
Baltimore, Maryland 21201
(410) 649-2000

Counsel for Respondents
J. Douglas Pinney, Patricia S.
Colonnel, Crystall Gilliam,
and Dimitri Mack

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly applied the "well-pleaded complaint" rule in holding that federal law is not an essential element of any of Respondents' state-law claims and that the complaints did not present a substantial federal question as would allow Petitioners to remove the cases pursuant to 28 U.S.C. §1441(a).

2. Whether these cases should be remanded for reconsideration in light of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 125 S.Ct. 2363 (2005), where the decision below rests upon controlling principles unaffected by *Grable* and a remand is unlikely to change the result.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
ARGUMENT:	
THE DECISION BELOW IS COMPATIBLE WITH THE PRINCIPLES OF *GRABLE* AND OTHER RELEVANT PRECEDENTS IN DETERMINING THAT THESE CASES DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION; REMAND FOR RECONSIDERATION OF THE DECISION BELOW IS UNNECESSARY	9
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464 (1947)	9
Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004)	12, 18
Beneficial Nat. Bank v. Anderson, 539 U.S. 1 (2003)	11, 16, 17, 18
Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987)	12, 15, 16
Christianson v. Colt Ind. Operating Corp., 486 U.S. 800 (1988)	9-10, 12, 13
The Fair v. Kohler Die & Specialty Co., 288 U.S. 22 (1913)	15, 16
Franchise Tax Bd. of Cal. v. Constr. Laborer's Vacation Trust, 463 U.S. 1 (1983)	12, 13, 15, 17
Geier v. American Honda Co., 529 U.S. 861 (2000)	18
Grable & Sons Metal Prods., Inc. v. Darue Eng'g. & Mfg., __ U.S. __, 125 S.Ct. 2363 (June 13, 2005)	*passim*
Great Northern R. Co. v. Alexander, 246 U.S. 276 (1918)	16
Gulley v. First Nat. Bank in Meridian, 299 U.S. 109 (1936)	11, 14, 15, 17
Healy v. Sea Gulf Specialty Co., 237 U.S. 479 (1915)	16
Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 816 (2002)	12, 15, 18
Hopkins v. Walker, 244 U.S. 486 (1917)	14
Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986)	16, 17
Metropolitan Life Ins. Co. v. Taylor, 481 U. S. 58 (1987)	17, 18

TABLE OF AUTHORITIES—Continued

Page

Oklahoma Tax Comm'n v. Graham, 489 U. S. 838 (1989) 12, 18
Ormet v. Ohio Power Co., 98 F.3d 799 (4th Cir 1996) 14
Rivet v. Regions Bank of Louisiana, 522 U.S. 470 (1998) 14, 17, 18
Taylor v. Anderson, 234 U.S. 74 (1914) 12
In re Wireless Telephone Radio Frequency Emissions Prod. Liab. Litig., 248 F. Supp. 2d 452 (D. Md. 2003) 7-8

Docketed Cases

Farina v. Nokia, Inc., No. 01-2477 (E.D. Pa. filed May 18, 2001) 2
Gilliam v. Nokia, Inc., No. 01-4275 (S.D.N.Y. filed May 18, 2001) 2
Gimpelson v. Nokia, Inc., No. 01-1615 (N.D. Ga. filed June 20, 2001) 2
Pinney v. Nokia, Inc., No. 01-1456 (D. Md. filed May 18, 2001) 2

Statutes

28 U. S. C. § 1254(1) 2
28 U. S. C. § 1331 ..... 5, 9, 12, 13, 18
28 U. S. C. § 1441 5
28 U. S. C. § 1441(a) 18
28 U. S. C. § 1442(a)(1) 5
28 U. S. C. § 1447(c) 6
28 U. S. C. § 1447(d) 9
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 6-7, 15

Rules

Supreme Court Rules
Rule 14.1(i) 8

TABLE OF AUTHORITIES—Continued

	Page
Federal Rules of Appellate Procedure	
Rule 36	2
Federal Rules of Civil Procedure	
Rule 12(b)(6)	7, 9
Miscellaneous	
H. R. Rep. No.104-204, pt. 1 (1995), *reprinted* in 1996 U.S.C.C.A.N 10 (1996)	15
Restatement (Third) of Torts: Products Liability (1997) §4(b), comment e	18

IN THE

Supreme Court of the United States

No. 05-207

CELLCO PARTNERSHIP, *et al.*,
Petitioners,

v.

J. DOUGLAS PINNEY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 402 F.3d 430 and reprinted in Petitioners' Appendix (Pet. App.) 1a-47a. That court's order denying rehearing and rehearing en banc (Pet. App. 96a-99a) is unreported. The memorandum opinion of the district court denying Respondents' motions to remand (Pet. App. 48a-95a) is reported at 216 F.Supp.2d 474. The district court's opinion and judgment on the merits is reported at 248 F.Supp.2d 452, but is not included in the Petitioners' Appendix. The order of the Judicial Panel on Multidistrict Litigation is reported at 170 F.Supp.2d 1356.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2005.[1] A petition for rehearing and rehearing *en banc* was denied on April 12, 2005 (Pet. App. 96a-99a). The Petition was filed in this Court on August 10, 2005, within the time extended by order of the late Chief Justice on July 8, 2005. Jurisdiction of this Court was invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioners include some but not all of the defendants named in four actions[2] that were brought separately in state courts of Maryland, Pennsylvania, New York and Georgia. They are service providers, manufacturers or distributors of portable wireless telephones. Respondents are the named plaintiffs in the four actions, which were filed during the year

---

[1] Petitioners assert that the Fourth Circuit's opinion "contains two different judgments—one judgment regarding the absence of federal jurisdiction that applies to four of the five cases on appeal, and a second judgment on the merits of federal preemption that applies only to the fifth case." Petition, at 1,n.1. In fact, the court of appeals entered only one judgment reversing separate orders of the district court. Pet.App 43a. *See* Rule 36, F.R.A.P. Nevertheless, we agree with Petitioners that the decision below resolves jurisdictional issues relating only to four of the five consolidated cases—*i.e. Pinney v. Nokia, Inc.*, No CCB-01-1456 (D. Md.), *Gimpelson v. Nokia, Inc.*, No. 1-01-CV-1615-WBH (N. D. Ga.), *Gilliam v. Nokia, Inc.*, No. 01CV-4275 (S.D.N.Y.), and *Farina v. Nokia, Inc.*, No. 01-2477 (JRP) (E. D. Pa.)—and that the petition concerns only the jurisdictional issue relevant to those four cases. The fifth case is the subject of a separate petition for writ of certiorari in *Nokia, Inc., et al. v.Garrett Naquin, et al*,, No. 05-198.

[2] Petitioners incorrectly describe these four cases as "nationwide class actions" (Petition, at 2). In fact, each of these four actions was brought on behalf of named individuals and a defined class consisting of residents of the state where the action was brought (e.g., Maryland (Pet. App. 109a, 119a); Pennsylvania (Pet. App. 164a, 171a), New York (Pet. App. 202a, 209a) and Georgia (Pet. App. 245a, 256a).

2001 in the Circuit Court for Baltimore City, Maryland (*J. Douglas Pinney and Patricia S. Colonell v. Nokia, Inc. et al.*, Pet. App. 100a), the Court of Common Pleas, Philadelphia County (*Francis J. Farina v. Nokia, Inc., et al.*, Pet. App. 158), the Supreme Court of the State of New York, County of Bronx (*Crystall Gilliam and Dimitri Mack v. Nokia, Inc., et al.*, Pet. App. 197a) and the Superior Court of Fulton County, State of Georgia (*Riedy Gimpselson v. Nokia, Inc., et al.*, Pet. App. 235a).

The complaints are similar in their allegations. The *Pinney* complaint is typical. It alleged that certain of the Petitioners had manufactured, supplied, promoted, sold, leased or provided service for wireless hand-held phones (WHHPs) with knowledge that their products emit radio frequency (RF) radiation that causes adverse cellular reactions and dysfunctions ("biological injury") and other long-term adverse health effects. Pet. App. 107a. Petitioners were charged with failing to disclose to the consuming public the fact that WHHPs emit radiation that causes biological injury and creates health risks. *Id.* When used as designed and intended for use, a WHHP rests against the user's ear with the radiating antenna next to the head. Pet. App.123a. The antenna is known to be an efficient conductor of RF radiation, which is capable of penetrating human tissue in close proximity to the temporal lobe of the brain. Pet. App.124a. The complaint alleges that Petitioners have exaggerated the safety of their products, based upon industry-sponsored research studies that are flawed, limited in scope, and contradicted by independent peer-reviewed research papers that raise serious questions about biological injury and health risks associated with long-term exposures to RF radiation. Pet. App. 124a-127a. Petitioners are alleged to have engaged in a course of conduct to suppress unfavorable studies, manipulate research and discredit adverse findings by independent scientists. Pet. App. 125-130a. According to the complaint, Petitioners have designed WHHPs to be used in conjunction with headsets which, when properly

used, eliminate the exposure to RF radiation by adding distance between the antenna and the ear. Pet. App.124a. Headsets have been commercially available at all relevant times but Petitioners market them as accessories at additional cost to consumers. Pet. App.124a.

All four of the complaints in these actions advance common law theories of strict product liability (failure to warn, design and manufacturing defects), breach of implied warranty and fraudulent concealment. All but *Gimpelson* assert violations of applicable state consumer protection laws. The *Pinney* and *Gimpelson* complaints also contain counts for negligence, fraud and civil conspiracy. All Respondents seek recovery of damages including but not limited to amounts necessary to purchase a headset or as reimbursement for making such a purchase, as well as declaratory and equitable relief.

The complaints do not assert any federal claim. They contain no reference to federal laws or regulations. In stating the facts, the complaints do make several incidental references to the Federal Communications Commission (FCC) and the Food and Drug Administration (FDA). *See, e.g.*, Pet. App. 122a-123 (certain service providers "are granted licenses by the FCC to broadcast wireless signals on specific frequency bands"); Pet. App.128a (attributing to Petitioners' trade association a press release that refers to the FCC).

There is nothing on the face of the complaints that would support the argumentative comment in the Petition that these lawsuits have "all the hallmarks of a federal regulatory proceeding." Petition, at 4. The Petition embellishes upon the complaints by importing extraneous language intended to add federal coloration to the averments. These textual embellishments are italicized as follows:

- The complaints do **not** allege "*that wireless telephones are licensed for sale by the FCC pursuant to a federal RF emissions regulation*" (Petition, at 4).

- The complaints do **not** "allege that *FCC-approved* phones are 'unreasonably dangerous'" (Petition, at 4).
- The complaints do **not** allege (nor concede) "*the fact that the telephones satisfied the RF emissions testing requirements set forth in FCC regulations. See 47 C.F.R. §2.1093"* (Petition, at 5).
- The complaints do "acknowledge that [several] petitioners 'are granted licenses by the FCC' to broadcast at specified radio frequencies (App. 122a-123a)" but the complaints do **not** allege "that wireless phones sold by Petitioners *are subject to FCC equipment authorization requirements*" (Petition, at 5).
- The complaints do "allege that [the trade association of the] petitioners acted 'dishonest[ly]' in 'stat[ing] that cell phones fall within the safety standards of the . . . FCC" (Petition, at 5) but further allege that the statement was made as part of an overall course of conduct described in the complaints.
- The complaints do **not** allege "that *FCC-compliant* telephones *authorized for use under federal regulations* were 'unreasonably dangerous . . .'" (Petition, at 6).
- The complaints do **not** allege "that *FCC-approved* wireless telephones were not 'safe and fit for [] use' unless equipped with additional safety devices *not required under the FCC equipment authorization regulations*" (Petition, at 6).

The federal coloration that the Petition adds to the pleaded allegations is not derived from the complaints, but originated in the notices of removal filed by Petitioners when they removed each of the four cases to a district court in the state where the action was pending. The notices of removal were identical. The *Pinney* notice were typical. C.A. App. 359-379. Removal was predicated upon 28 U.S.C. §§1331, 1441, and 1442(a)(1). The notices stated three grounds for removal: the

"substantial federal question" doctrine, the "artful pleading" doctrine and the theory that, as FCC licensees, Petitioners were "acting under" a federal officer or agency of the United States. C.A. App. 360. In attempting to identify a substantial federal question, the notices of removal asserted that each "suit essentially attacks the RF emission standards established by federal regulation." C.A. App. 361. Petitioners went on to outline a "comprehensive and uniform regulatory framework for all wireless telephone services" (C.A. App. 363). While admitting that Respondents "assert only state law causes of action" (C.A. App. 366), the removal notices argued that "the elements of those causes of action will require this Court to resolve substantial disputed questions of federal law." C.A. App. 366.

Respondents filed timely motions pursuant to 28 U.S.C. §1447(c) to remand each of the four actions for lack of subject matter jurisdiction. In memoranda opposing the remand motions, Petitioners relied upon the three grounds stated previously in their notices of removal and also added a fourth—the "complete preemption" doctrine. Thereafter, on October 31, 2001, acting on motion of the Petitioners, the Judicial Panel on Multidistrict Litigation ordered transfer of the cases for consolidated pretrial proceedings in the United States District Court for the District of Maryland.

On June 21, 2002, following briefing and argument, the district court denied the Respondents' motions to remand. Pet. App. 95a. Characterizing the state-law claims as a "disguised attack on federal regulations" (Pet. App. 54a), the court ruled that the claims necessarily depend upon resolution of a substantial federal question. Pet. App. 57a-79a. Other asserted grounds for removal were considered but rejected. Pet. App. 79a-95. In finding federal question jurisdiction, the district court went far beyond the complaints to present a detailed analysis of the comprehensive nature of federal regulation of RF emissions, including the text and legislative history of the Telecommunications Act of 1996. Pet. App.

60a-69a. From that analysis the district court concluded that Respondents' claims "put the validity of the federal regulations, and the process by which they were developed, directly in dispute." Pet. App. 71a. The court added: "Although none of these claims explicitly challenge the FCC's radiation exposure guidelines, an examination of the class plaintiffs propose and the remedy plaintiffs request reveals that the true gravamen of these complaints is to attack the lack of a headset requirement under the federal RF safety rules." *Ibid.* These stated concerns led the district court to conclude that state court adjudication of Respondents' claims would be incompatible with the federal regulatory regime:

> While state courts ultimately might conclude that they are preempted from regulating the wireless industry on the basis of RF concerns, the risk of fifty different states articulating fifty different rules about whether and to what extent they may set RF safety standards could create market instability and prevent the maintenance of an unimpeded national network of rapid and efficient telecommunications service, a goal of significant importance in national commerce and security. With these federal interests figuring so centrally to [Respondent] plaintiffs' case, removal is fully justified.

Pet. App. 76a-77a.

Petitioners next moved pursuant to Rule 12(b)(6), F.R.C.P., to dismiss Respondents' lawsuits on the ground that all of the claims were preempted by federal law. On March 5, 2003, without reaching other theories of preemption, the district court dismissed the actions on the basis of conflict preemption. *In re Wireless Telephone Radio Frequency Emissions Prod. Liab. Litig.* 248 F. Supp. 2d 452 (D. Md. 2003).[3] Spe-

---

[3] Petitioners' Appendix does not contain the district court's opinion and order dismissing these actions pursuant to Rule 12(b)(6), reported at 248 F. Supp. 2d 452, although the opinion is relevant to the judgments

cifically, the district court ruled that the relief sought was inconsistent with Congress's objective of achieving national uniformity in regulating RF radiation levels for all wireless communications. *Id.*, 463. The district court incorporated by reference its earlier opinion upholding federal-question jurisdiction (*id.*, 457, n.1) and cited many passages from that opinion as supporting a finding of conflict preemption. *Id.*, 458-60, 461n.12, 463-65.

A panel of the court of appeals reversed. Pet. App.43a. The panel was divided over the existence of a substantial federal question, the dissenting judge being in accord with the district court's analysis of that issue. Pet. App. 43a-47a. The panel majority (Luttig and Michael, Circuit Judges) held that removal of these four cases could not be sustained on the basis of a substantial federal question. Pet. App. 25a. After a fact-intensive examination of the complaints (Pet. App. 9a-10, 13a-18a), the majority found "one thing is clear: the elements of each of the claims depend only on the resolution of questions of state law." Pet. App.18a. It held that "[t]he district court erred by not recognizing that its inquiry was limited by the well-pleaded complaint rule" (*ibid*) and in allowing removal by anticipating the defense of preemption urged by Petitioners. Pet. App.19a. In response to arguments that certain claims raised federal issues, the majority found that the arguments were either "wrong" (Pet. App. 20a) or a "mischaracterization" of the claim. Pet. App. 21a. Finally, the panel rejected Petitioner's theory that a "sufficient connection" of the claims to a federal regulatory scheme might suffice to establish federal question jurisdiction. Pet. App. 22a-24a.

Having determined that the claims do not arise under federal law under any of the removal theories, the panel majority

---

entered by that court and by the court of appeals. Supreme Court Rule 14.1(i).

held that district court lacked subject-matter jurisdiction over the four cases, making their removal improper. Pet. App. 28a. Accordingly, the district court lacked power in those cases to consider or decide the preemption issues raised by Petitioners in their Rule 12(b)(6) motion to dismiss. *Ibid.* As a result, the court of appeals returned the cases to the district court for remand of each case to the state court in which it originated. Pet. App. 43a. Without dissent, it denied Petitioners' rehearing petition. Pet. App. 99a. In conformity with the mandate of the court of appeals, the district court remanded each action to the originating state court, where the action is now pending.[4]

ARGUMENT

THE DECISION BELOW IS COMPATIBLE WITH THE PRINCIPLES OF *GRABLE* AND OTHER RELEVANT PRECEDENTS IN DETERMINING THAT THESE CASES DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION; REMAND FOR RECONSIDERATION OF THE DECISION BELOW IS UNNECESSARY.

On June 13, 2005, two months after the Fourth Circuit had rendered its decision and denied a petition for rehearing, this Court handed down *Grable & Sons Metal Prods., Inc. v. Darue, Eng'g & Mfg.*, __ U. S. __, 125 S. Ct. 2363 (2005). In *Grable*, this Court re-examined the "substantial federal question" doctrine and concluded that there is " no single, precise, all-embracing" test for identifying federal questions that will support jurisdiction under 28 U. S. C. §1331. *Grable*, 125 S. Ct. at 2368, quoting *Christianson v. Colt*

---

[4] Despite the literal terms of 28 U.S.C. § 1447(d), this Court's certiorari jurisdiction would appear to be unaffected by the district court's order remanding these four cases and transferring the records to the state courts, where the cases are now pending. *See Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947).

Ind. Operating Corp., 486 U. S. 800, 821 (1988) (Stevens, J., concurring).

Petitioners urge this Court to grant the writ of certiorari, vacate the judgment below and remand these cases to the Fourth Circuit for reconsideration in light of *Grable*. Petition, at 4, 9-10, 18. For reasons that follow, Respondents disagree and oppose remand. While lacking the benefit of *Grable*, the court of appeals applied the principles recognized in other relevant precedents of this Court that remain viable and vital today. The Fourth Circuit panel decision rests upon four bedrock principles, correctly stated and properly applied in the majority opinion:

- Federal question jurisdiction is determined by the "well-pleaded complaint" rule, which holds that courts ordinarily look no further than the plaintiffs' complaint in determining whether a lawsuit raises issues of federal law capable of creating federal question jurisdiction. Pet. App., 11a-12a, 18a.
- If federal law does not create the cause of action, the rule requires a complaint to establish that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded claims. Pet. App. 12a, 13a.
- A plaintiff is "master of the claim" and may avoid federal jurisdiction by exclusive reliance on state law in drafting the complaint. Pet. App. 12a.
- A preemption defense that raises a federal question is inadequate to confer federal jurisdiction. Pet. App. 19a. A case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case. Pet. App, 13a, 19a.

These propositions are basic and anchored by a century of federal jurisprudence. If they have been displaced by *Grable*, then it remains for this Court and this Court alone to say so after plenary review. In the meantime, this Court's precedents supporting these propositions are binding upon the Fourth Circuit, which applied them before to these cases and may be expected to apply them again if called upon to do so. A remand to the court of appeals for reconsideration in light of *Grable* is unnecessary and a likely waste of judicial resources. We respectfully submit that the decision below is entirely consistent with *Grable* and should not be disturbed.

As this Court acknowledges, federal question jurisdiction is usually invoked by pleading a cause of action created by federal law. *Grable*, 125 S. Ct. at 2366. "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." *Beneficial Nat. Bank v. Anderson*, 539 U. S. 1, 6 (2003). There is a "less frequently encountered" qualification of this rule, however. *Grable*, 125 S. Ct. at 2366. This Court has "recognized for nearly 100 years that in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues." *Id.* No bright line can be drawn but *Grable* has added focus to the inquiry. Thus, "the question is, does a state-law claim necessarily raise a *stated* federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 125 S. Ct. at 2368 (emphasis added).

The inquiry posed in *Grable* should be understood as resting upon two implicit assumptions. The federal issue (1) must be "stated" in the plaintiff's own complaint (125 S. Ct. at 2368) and (2) must constitute an essential element of plaintiff's state-law claim. *See Gulley v. First Nat. Bank in Meridian*, 299 U. S. 109, 112-13 (1936). The quiet title action in *Grable*, for example, was premised on a failure of the IRS

to give the plaintiff adequate notice, as defined by federal law. 125 S.Ct. at 2366, 2368. "Whether Grable was given notice within the meaning of the federal statute is thus an *essential element* of its quiet title claim, and the meaning of the federal statute is actually in dispute; it appears to be the only legal or factual issue contested in the case." *Id.* at 2368 (emphasis added). Obviously, then, *Grable* presented this Court with a claim in which a federal issue constituted an "essential element" of the state-law cause of action.

The "well-pleaded complaint" rule was tacitly acknowledged in *Grable* in that a "stated" federal issue was presented. In these four cases, the court of appeals applied that rule in line with this Court's prior decisions. Pet. App.12a, 18a-19a. Ordinarily, federal-question jurisdiction turns on the "well-pleaded complaint" rule. *Aetna Health, Inc. v. Davila*, 542 U. S. 200, 124 S. Ct. 2488, 2495 (2004); *Oklahoma Tax Comm'n. v. Graham*, 489 U. S. 838, 840 (1989). The rule "has long governed whether a case 'arises under' federal law for purposes of 28 U. S. §1331." *Holmes Group, Inc. v. Vornado Air. Systems, Inc.*, 535 U. S. 826, 830 (2002). The rule operates "on the principle that that federal jurisdiction generally exists 'only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.'" *Id.*, 831, quoting *Caterpillar Inc. v. Williams*, 482 U. S. 482 U. S. 386, 392 (1987). The allegations of the complaint are controlling. Whether federal-question jurisdiction exists "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U. S. 74, 75-76 (1914). *See Aetna Health*, 124 S. Ct. at 2494; *Oklahoma Tax Comm'n.*, 489 U. S. at 841; *Christianson v. Colt Ind. Op. Corp.*, 486 U. S. 800, 808 (1988); *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust*, 463 U. S. 1, 10 (1983).

The decision below observed that state law created all of the Respondents' claims, but the inquiry did not stop there. Pet. App. 12a. The panel inquired further "whether these cases fall within the small class of 'cases in which a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded . . . claims.'" Pet. App. 12, quoting *Christianson*, 486 U. S. at 808, and *Franchise Tax Bd.*,, 463 U. S. at 13. A meticulous count-by-count evaluation of each state-law claim in the four cases (Pet. App. 12a-18a) led the panel to conclude that "one thing is clear: the elements of each of the claims depend only on the resolution of state law." Pet. App. 18a. Parts of the complaints targeted by the Petitioners and by the dissenting judge were also reviewed and explained in context. Pet. App. 20a-22a.

The Petition attacks this conclusion as contradicting *Grable* by applying what they depict as "a bright-line rule that gives conclusive weight to one factor (such as whether a particular element of a state law claim turns on federal law)", to the exclusion of "other factors" that Petitioners want considered. Petition, at 11. *Grable* itself, however, rests upon a plain finding that a substantial and disputed federal question constituted "an essential element" of the quiet title claim. 125 S. Ct. at 2368. The "essential element" test is entirely compatible with *Grable*'s assurance that the federal question presented must be substantial, disputed and necessary to resolve. *Ibid.* If a federal question is not an essential element of a state cause of action, then it is not placed in "dispute" and the right to relief does not depend upon its resolution. Such a claim is not one "arising under the Constitution, laws or treaties of the United States." 28 U. S. C. §1331.

Moreover, the reference in *Grable* to an "essential element" was not a stray remark but is supported by precedents cited in the opinion. For example, Mr. Justice Cardozo is

quoted for his famous explanation that the exercise of federal-question jurisdiction calls for "a common-sense accommodation of judgment to [the] kaleidoscopic situations that present a federal issue, in a selective process which picks the substantial causes out of the web and lays the other ones aside." *Gully*, 299 U. S. at 117-18, as quoted in *Grable*, 125 S.Ct. at 2367. And yet it was Mr. Justice Cardozo's opinion in *Gully* that reaffirmed the test, then already "well-established", that federal law "must be an *element*, and an *essential* one, of plaintiff's cause of action." *Id.*, 299 U. S. at 112 (emphasis added). *See Rivet v. Regions Bank of Louisiana*, 522 U. S 470, 475 (1998). *Grable* also quoted an earlier opinion for its conclusion that "the facts showing the plaintiff's title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are *essential parts of the plaintiff's cause of action.*" *Hopkins v. Walker*, 244 U. S. 486, 490 (1917), as quoted in *Grable*, 125 S. Ct. at 2368-69 (emphasis added). In short, there is simply no merit in the contention here that the decision below went astray in testing the complaints in these actions in accordance with the "essential element" standard.[5]

Petitioners urge a wide-ranging consideration of "other factors" (Petition, at 11) that lie outside the complaint. Ap-

---

[5] As they did in their petition for rehearing in the Fourth Circuit, Petitioners complain that the decision below conflicts with the Fourth Circuit's earlier decision in *Ormet v. Ohio Power Co.*, 98 F.3d 799 (4th Cir. 1996), while adding that this Court has "endorsed" *Ormet* in *Grable*. Petition, at 16. The majority opinion, which was authored by a member of the panel which decided *Ormet*, carefully distinguished that decision from the other. Pet. App. 22a-24a. After the decision below had been rendered, Petitioners sought rehearing and rehearing en banc, inviting the Fourth Circuit to resolve the asserted conflict with *Ormet*. No member of the Court (including the member who wrote the *Ormet* opinion) requested a poll on the petition for rehearing en banc. Pet. App.99a. The petition for rehearing was denied by the panel, without dissent.

parently, these "other factors" would include the Petitioners' own added embellishments regarding the FCC regulatory scheme, their asserted compliance with FCC regulations, and even the legislative history of the Telecommunications Act of 1996. Petition, at 13-14[6]. Petitioners injected these matters into all four cases in their notices of removal. C.A. App. 360-367. Defensive submissions that supplement the complaint, however, if given weight, "would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine" and radically expand the class of removable cases. *Holmes Group*, 535 U. S. at 832.

Under the "well-pleaded complaint" rule, as Mr. Justice Cardozo also has observed, "the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." *Gully*, 299 U. S. at 113. *See Caterpillar*, 482 U. S. at 392. Over the years, this Court has rejected proposals that the defendant's notice of removal, the defendant's answer or a counterclaim to the complaint should be consulted before making a determination of federal-question jurisdiction. *Holmes Group*, 535 U. S. at 831. *See Franchise Tax Bd.*, 463 U. S. at 10-11, n.9; *The Fair v. Kohler Die & Specialty Co*, 228 U. S. 22, 25 (1913). Federal courts are admonished to "examine the 'well pleaded'

---

[6] Although irrelevant to removal jurisdiction, the Petition's excursion into legislative history illustrates the hazards of the journey. The Petition states that "Congress specifically identified nationally uniform RF emissions standards as a legislative objective", and then quotes a committee report as proof of that statement. Petition, at 13-14 quoting H.R. Rep. No. 104-204, pt. 1 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 61. One problem with the committee report is that it dealt with the siting of antenna, cell stations, and infrastructure-related equipment, rather than wireless telephones sold or leased to consumers. *Id.* A greater problem facing Petitioners is that the committee report spoke to a bill that was never enacted.

allegations of the complaint and ignore potential defenses." *Beneficial National Bank*, 539 U.S. at 6.

> [A] *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If the defendant could do so, the plaintiff would be master of nothing.

Caterpillar, 482 U. S. at 399 (emphasis in original; fn omitted).

Another corollary of "[t]he well-pleaded complaint rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U. S. at 392 (fn. omitted). It does not suffice that the facts alleged in support of an asserted state-law claim would *also* support a federal claim. *Beneficial Nat. Bank*, 539 U. S. at 12 (Scalia, J., dissenting). *See Caterpillar*, 482 U. S. at 395 (plaintiffs "could have brought suit under [federal law]; [a]s masters of the complaint, however, they chose not to do so"). *See also Great Northern R. Co. v. Alexander*, 246 U. S. 276, 282 (1918)("the plaintiff may by the allegations of his complaint determine the status with respect to removability"); *Healy v. Sea Gulf Specialty Co.*, 237 U. S. 479, 480 (1915)("the plaintiff is absolute master of what jurisdiction he will appeal to"); *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913)("[o]f course the party who brings a suit is master to decide what law he will rely upon"). Nor does it "suffice that the facts alleged in support of an asserted state-law claim *do not support* a state-law claim and would *only* support a federal claim." *Beneficial Nat. Bank*, 539 U. S. at 12 (Scalia, J., dissenting; emphasis in original). "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U. S. 804, 809, n.6 (1986).

In the district court, Petitioners argued at length that the resolution of claims in these actions under state law would pose an irreconcilable conflict with federal legislative policies and FCC regulation. The district court adopted much of their argument. *See* discussion, *supra* at p. 7-8. In so doing, the district court disregarded a major corollary of the "well-pleaded complaint" rule. Its ruling was condemned on that account. Pet. App. 18a-19a. Preemption is a defense to a complaint and may not be invoked to justify removal. *Beneficial Nat. Bank*, 539 U.S. at 6. "A defense that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow Pharmaceuticals*, 478 U. S. at 808. *See Rivet*, 522 U.S. at 475 ("[a] defense is not part of a plaintiff's properly [p]leaded statement of his or her claim"). See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). "[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Franchise Tax Bd.*, 463 U.S. at 14. *See Rivet*, 522 U.S. at 475. *Caterpillar*, 482 U.S. at 393. "By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Gully*, 299 U.S. at 116. *See Rivet*, 522 U.S. at 476. In short, the presence of a federal question "in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." *Caterpillar*, 482 U. S. at 398-399.

Petitioners do not question the panel's determination that conflict preemption was the real thrust of their argument for removal based on a federal question. Instead, Petitioners shift

ground and assert that their self-proclaimed compliance with federal regulations has "qualitative significance" that should count for something. Petition, at 13. As the decision below recognizes, however, any such compliance constitutes a *defense* to claims under the laws of Georgia, Maryland and New York (Pet. App. 20a), just as it does in most other jurisdictions. *See Geier v. American Honda Motor Co.*, 529 U. S. 861, 869-70 (2000) (citing *Restatement (Third) of Torts: Products Liability*, §4(b), comment *e* (1997)); see *id.*, 892-93 (Stevens, J., dissenting).[7] Even "the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law." *Oklahoma Tax Comm'n.*, 489 U. S. at 481.

Nothing in the *Grable* decision either repudiates or displaces the "well-pleaded complaint" rule or its several corollaries. The rule "is the basic principle marking the boundaries of the federal-question jurisdiction of the federal district courts." *Metropolitan Life*, 481 U. S. at 64. That rule (and the policies supporting it, *see Holmes Group*, 535 U.S. at 831-32) is both too firmly established and too recently articulated to necessitate further review of the rule's application in these cases. *See Aetna Health*, 124 S. Ct. 2488 at 2494 (whether a particular case arises under federal law ordinarily turns on the "well-pleaded complaint" rule). The statutes controlling federal-question removal jurisdiction, 28 U.S.C. §§1331 and 1441(a), have been amended several times since the well-pleaded complaint rule was developed. That rule and its corollaries now form an integral part of the "congressionally approved balance of federal and state

---

[7] Pennsylvania law attaches no legal significance to product compliance. Pet. App. 20a-21a. The Petition also notes two federal decisions upholding FCC regulation of RF emissions. Petition, at 14, n.2. The preclusive effect of a prior federal judgment, if any, is a defense that will not provide a basis for removal. *Rivet*, 522 U. S. at 478. See *Beneficial Nat. Bank*, 539 U. S. at 6.

judicial responsibilities" (*Grable*, 125 S. Ct. at 2368) that this Court has endeavored to maintain for more than a century. That balance should not now be disturbed. Having applied the controlling principles that this Court has developed and reaffirmed, the decision below does not warrant reconsideration by the Fourth Circuit.

CONCLUSION

For each of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH A. JACOBSEN
LAW OFFICES OF
KENNETH A. JACOBSEN
22 West Front Street
Media, Pennsylvania 19063
(610) 566-7930

JOSEPH A. O'KEEFE
O'KEEFE & SHER, P.C.
15019 Kutztown Road
Kutztown, Pennsylvania 19530
(610) 683-0771

Counsel for Respondent
Francis J. Farina

MICHAEL WEINSTOCK
RICHARD CAPRIOLA
MATTHEW W. CARLTON
Weinstock & Scavo, P.C.
3405 Piedmont Road, N.E.
Suite 300
Atlanta, Georgia 30305
(404) 231-3999

Counsel for Respondent
Riedy Gimpelson

HARLEY THOMAS HOWELL
Counsel of Record
WILLIAM F. GATELY
HOWELL & GATELY
One Charles Center, 19th Floor
100 North Charles Street
Baltimore, Maryland 21201
(410) 649-1103

Counsel for Respondents
J. Douglas Pinney and
Patricia S. Colonnel

H. RUSSELL SMOUSE
GLENN E. MINTZER
LAW OFFICES OF PETER G.
ANGELOS, P.C.
One Charles Center
100 North Charles Street
Baltimore, Maryland 21201
(410) 649-2000

Counsel for Respondents
J. Douglas Pinney, Patricia S.
Colonnel, Crystall Gilliam,
and Dimitri Mack

FILED
OCT 11 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-207

IN THE

Supreme Court of the United States

CELLCO PARTNERSHIP, *et al.*,
Petitioners,

v.

J. DOUGLAS PINNEY, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ANDREW G. MCBRIDE
HELGI C. WALKER
KATHRYN COMERFORD TODD
JOSHUA S. TURNER
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000

JOHN H. BEISNER
Counsel of Record
BRIAN P. BROOKS
SARAH A. GOLDFRANK
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

Counsel for Petitioners Cellco Partnership, Verizon Maryland, Inc., and Verizon Communications Inc.
Additional parties and counsel on inside cover and subsequent pages

KENNETH S. GELLER
DAVID M. GOSSETT
MAYER, BROWN, ROWE
& MAW LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

SEAMUS C. DUFFY
CHRISTOPHER M. ARFAA
DRINKER BIDDLE & REATH LLP
One Logan Square
18th & Cherry Streets
Philadelphia, PA 19103
(215) 988-2700

Counsel for SBC Communications, Inc.

PAUL D. KRAUSE
LAURA N. STEEL
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
1341 G Street, NW, Suite 500
Washington, DC 20015
(202) 626-7660

H. MICHAEL O'BRIEN
JASON P. SULTZER
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
3 Gannett Drive
White Plains, NY 10604
(914) 323-7000

Counsel for SANYO North America Corporation and Matsushita Electrical Corporation of America

CHARLES L. PERRY
ANDREWS KURTH LLP
1717 Main Street, Suite 3700
Dallas, TX 75201
(214) 659-4681

Counsel for Cellular One Group

EUGENE A. SCHOON
TAMAR B. KELBER
SIDLEY AUSTIN BROWN
& WOOD LLP
Bank One Plaza
10 S. Dearborn
Chicago, IL 60603
(312) 853-7000

Counsel for T-Mobile USA, Inc. Powertel, Inc., Powertel/ Atlanta, Inc. and Powertel PCS, Inc.

JOHN J. NAGLE III
BODIE, NAGLE, DOLINA, SMITH & HOBBS, P.A.
21 W. Susquehanna Avenue
Towson, MD 21204
(410) 823-1250

Counsel for Communications Electronics, Inc.

MAUREEN E. MURPHY
MURPHY & MURPHY, L.L.C.
14 North Rolling Road
Catonsville, MD 21228
(410) 744-4967

Counsel for Baltimore Business Communications, Inc.

ROBERT B. GREEN
IRWIN GREEN & DEXTER, LLP.
301 W. Pennsylvania Avenue
Towson, MD 21204
(410) 832-0111

Counsel for Cellular Telecommunications & Internet Association

DANIEL S. REINHARDT
STEVEN J. HEWITSON
TROUTMAN SANDERS LLP
5200 Bank of America Plaza
600 Peachtree Street, NE
Atlanta, GA 30308
(404) 885-3000

Counsel for Southern Communications Services, Inc.

FRANCIS A. CITERA
GREENBERG TRAURIG, LLP
77 West Wacker Drive
Suite 2500
Chicago, IL 60601
(312) 456-8413

Counsel for Sony Electronics Inc.

JOHN B. ISBISTER
HAROLD M. WALTER
TYDINGS & ROSENBERG LLP
100 East Pratt Street, Suite 2600
Baltimore, MD 21202
(410) 752-9700

Counsel for Samsung Electronics America, Inc.

PAUL H. VISHNY
PAUL E. FREEHLING
SEYFARTH SHAW LLP
55 East Monroe Street
Suite 4200
Chicago, IL 60603
(312) 346-8000

Counsel for Telecommunications Industry Association

KEVIN B. GETZENDANNER
MATTHEW T. COVELL
ARNALL GOLDEN GREGORY, LLP
171 17th Street NW
Atlanta, GA 30363
(404) 873-8500

Counsel for Mitsubishi Wireless Communications, Inc.

J. STAN SEXTON
DOUGLAS S. BECK
SHOOK, HARDY & BACON, LLP
2555 Grand Blvd.
Kansas City, MO 64108
(816) 474-6550

Counsel for Sprint Spectrum L.P.

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 3

I. THE NARROW AND RIGID TEST APPLIED BY THE COURT OF APPEALS AND DEFENDED BY RESPONDENTS IS INCONSISTENT WITH GRABLE AND ITS PROGENY 3

II. UNDER GRABLE, SEVERAL SUBSTANTIAL FEDERAL QUESTIONS ARE EMBEDDED IN THESE COMPLAINTS. 6

A. Reconsideration In Light Of Grable Will Change The Jurisdictional Outcome 6

B. Corrective Action is Necessary to Avoid Propagation of the Pinney Panel's Errors in the Fourth Circuit. 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Aetna Cas. & Sur. Co. v. Flowers,
330 U.S. 464 (1947) 3

Becnel v. KPMG LLP,
No. 05-6015, 2005 U.S. Dist. LEXIS
17905 (W.D. Ark. June 21, 2005) 6

Bourke v. Carnahan,
No. C2-03-144, 2003 U.S. Dist. LEXIS
13399 (S.D. Ohio July 1, 2003) 9

Buckman Co. v. Plaintiffs' Legal Comm.,
531 U.S. 341 (2001) 8

Cellular Phone Taskforce v. FCC,
205 F.3d 82 (2d Cir. 2000) 8

EMR Network v. FCC,
391 F.3d 269 (D.C. Cir. 2004) (*cert.
denied*, 125 S. Ct. 2925 (2005)) 9

*Grable & Sons Metal Prods., Inc. v. Darue
Eng'g & Mfg.*,
125 S. Ct. 2363 (2005) 1, 4, 5

Hoffman v. Hunt,
126 F.3d 575 (4th Cir. 1997) 10

In re Otter Tail Power Co.,
116 F.3d 1207 (8th Cir. 1997) 3

Jackson v. Purdue Pharma Co.,
No. 6:02-cv-1428, 2003 U.S. Dist. LEXIS
6998 (M.D. Fla. April 11, 2003) 10

*Municipality of San Juan v. Corporacion para
el Fomento Economico de la Ciudad
Capital*,
415 F.3d 145 (1st Cir. 2005) 5

Ormet Corp. v. Ohio Power Co.,
98 F.3d 799 (4th Cir. 1996) 4

TABLE OF AUTHORITIES
(cont.)

Page

Sutter Health v. Unite Here,
No. 2:05-CV-1061, 2005 U.S. Dist.
LEXIS 20892 (E.D. Cal. Aug. 10, 2005) 9

T&E Pastorino Nursery v. Duke Energy Trading & Mktg., L.L.C.,
268 F. Supp. 2d 1240 (S.D. Cal. 2003) 9

Torres v. Southern Peru Copper Corp.,
113 F.3d 540 (5th Cir. 1997) 3, 4

Wisconsin v. Abbott Laboratories,
No. 05-C-408-C, 2005 U.S. Dist. LEXIS
22013 (W.D. Wis. Sept. 29, 2005) 6

STATUTES AND REGULATIONS

28 U.S.C. § 1447(d) 3

47 C.F.R. § 2.1093 ..... 7, 8

5 U.S.C. §§ 701 *et seq.* 2

INTRODUCTION

Respondents acknowledge that this Court's decision in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005), "concluded that there is 'no single, precise, all-embracing' test for identifying federal questions that will support jurisdiction under 28 U.S.C. § 1331," Opp. at 9 (quoting *Grable*, 125 S. Ct. at 2368), and that the court of appeals "lack[ed] the benefit of *Grable*" when it found jurisdiction lacking in the four cases that are the subject of the petition for writ of certiorari. Opp. at 10. Respondents also acknowledge that the court of appeals applied what appears to be a "single, precise, all-embracing" test: "[t]he 'essential element' test," under which an action is subject to substantial federal question jurisdiction only if "a particular element of a state law claim turns on federal law." Opp. at 13 (quoting Pet. at 11). Nonetheless, Respondents urge that GVR be denied for two reasons: that the "essential element" test employed by the court of appeals is consistent with pre-*Grable* precedent that was left undisturbed by *Grable*, *see* Opp. at 11-17; and second, that, if given the opportunity to reconsider its decision in light of *Grable*, the court of appeals is unlikely to change its result. *See* Opp. at (i), 17-19. Neither argument has merit.

Respondents' first argument reflects a basic misunderstanding of the nature and purpose of the substantial federal question doctrine. The substantial federal question doctrine exists to ensure that federal courts can adjudicate that narrow category of cases that raise important and disputed issues of federal law, even though the plaintiff has not elected to seek relief directly under federal law. *Grable* dictates that whether a given case falls within this category is based on a "contextual enquiry," 125 S. Ct. at 2370, not based on an inquiry that is limited to the words a given plaintiff happened to use in the complaint, or to the elements of the particular claims a given plaintiff happened to assert in the complaint. The substantial federal question doctrine serves as a safety

valve to ensure that substantial, disputed issues of federal law and policy are decided by the federal courts even –and perhaps especially – where a particular plaintiff seeks to avoid federal jurisdiction by omitting from the complaint all overt reference to the controlling federal law. Despite the fact that the substantial federal question doctrine is an exception to the "well-pleaded complaint rule," which governs jurisdictional analysis in other contexts, the Fourth Circuit essentially conflated two analyses, thus eliminating *Grable*'s contextual enquiry into the relationship between state claims and federal law.

Respondents are equally wrong to suggest that the court of appeals should not be given an opportunity to reconsider its decision in light of *Grable* because they claim reconsideration is not likely to result in a different outcome. As an initial matter, notwithstanding Respondents' self-serving characterization of their own complaints, *see* Opp. at 4-5, the complaints themselves reveal substantial connections to the Federal Communications Commission ("FCC") regulations that exclusively govern wireless telephone safety and safety testing. But more importantly, the "contextual enquiry" mandated by *Grable* requires more than examining the specific words Respondents happened to use in their complaints, and here reveals precisely what the district court and dissenting Senior Judge Kiser found below: that each of these four actions is a thinly disguised challenge to the validity and sufficiency of the FCC's radio frequency ("RF") safety and testing regulations, and thus are no less subject to federal jurisdiction than were the two challenges to those same regulations brought under the Hobbs Act, 5 U.S.C. §§ 701 *et seq.*, and rejected by the U.S. Courts of Appeals for the Second and District of Columbia Circuits.

Even granting the possibility that the Fourth Circuit panel might reach the same result after reconsideration, corrective action is independently justified. The court of appeals should be afforded the opportunity to articulate, consis-

tent with *Grable*, the analysis that courts in the Fourth Circuit will be required to employ in future cases involving the substantial federal question doctrine.[1]

ARGUMENT

I. THE NARROW AND RIGID TEST APPLIED BY THE COURT OF APPEALS AND DEFENDED BY RESPONDENTS IS INCONSISTENT WITH GRABLE AND ITS PROGENY.

Respondents rely heavily on the propositions that pre-*Grable* case law recognized a narrow "essential element" test for substantial federal question jurisdiction, *see* Opp. at 10-11, and that *Grable* does not call that approach into question. *See id.* at 12-14. Respondents are incorrect on both counts.

Before *Grable*, numerous courts of appeals had recognized substantial federal question jurisdiction in cases where no specific element of a state-law claim turned on a determination of federal law. Petitioners previously identified two examples of cases – *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), and *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997) – in which courts of appeals found substantial federal question jurisdiction despite the fact that no specific element of a specific state-law claim required a determination of federal law. In both cases, the courts considered all the connections – explicit and implicit – between the complaint allegations and underlying federal

---

[1] Respondents concede the existence of appellate jurisdiction, while implying that "the literal terms of 28 U.S.C. § 1447(d)" might call this Court's jurisdiction into question. Opp. at 9 n.4. The "literal terms of" Section 1447(d) do not apply here at all, since Petitioners are not seeking review of "[a]n order remanding a case to the State court." 28 U.S.C. § 1447(d). On the contrary, the jurisdictional order at issue in this case is an order of the district court *denying* remand, which order was reversed and remanded to the district court by the court of appeals and is now presented to this Court. *See Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947).

interests in concluding that substantial federal question jurisdiction existed. The *Torres* court, for example, found it jurisdictionally significant that "the Peruvian government ha[d] participated substantially in the activities for which" the defendant was being sued, that the "[Peruvian] government extensively regulates the mining industry," and that the action "strikes not only at vital economic interests but also at Peru's sovereign interests by seeking damages for activities and policies in which the government actively has been engaged." 113 F.3d at 543. Thus, contrary to Respondents' suggestion, pre-*Grable* case law outside the Fourth Circuit recognized that substantial federal question jurisdiction could arise because a plaintiff's state-law claims, although avoiding citation to federal law, inevitably required adjudication of the meaning or validity of federal law or because the relief sought directly implicated federal law. It is telling that neither *Torres* nor *Otter Tail*, both of which were discussed in the petition, are addressed in Respondents' brief.

Of course, before it handed down its decision in this case, the Fourth Circuit itself had recognized that substantial federal question jurisdiction could exist even if no specific element of an asserted state-law cause of action turned on an interpretation of federal law. *See Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799 (4th Cir. 1996). While Respondents correctly point out that one of the three panel judges in *Ormet* (though not its author) wrote the opinion below, *see* Opp. at 14 n.5, they provide no explanation for how *Ormet* – which approved substantial federal question jurisdiction over a breach-of-contract action because the subject of the contract, tradeable emissions permits, were created by the federal Clean Air Act – can be squared with the "essential element" test adopted by the panel majority below. Given this Court's citation of *Ormet* with approval in *Grable*, *see Grable*, 125 S. Ct. at 2366 n.2, the simple fact is that the opinion below has shifted doctrinal ground under this Court's feet. This fact alone provides more than sufficient

grounds to grant the petition, vacate the judgment below, and remand in light of *Grable*.[2]

However unfounded a narrow "essential element" test was before *Grable*, *Grable* and its progeny demonstrate that such a wooden test is no longer supportable. *Grable* itself makes clear that the mechanical "essential element" test, simple as it would be to apply, is both too broad and too narrow. It is too broad because, taken seriously, it would extend federal jurisdiction to every case in which a duty alleged to have been breached was a duty imposed by federal law; numerous negligence per se and nuisance cases could be federalized under the "essential element" standard. Rejecting that prospect, *Grable* states that the "mere need to apply federal law in a state-law claim will [not] suffice to open the 'arising under' door." 125 S. Ct. at 2367. Yet the "essential element" test is also too narrow because it excludes cases in which a "contextual enquiry" identifies "a serious federal interest in claiming the advantages thought to be inherent in a federal forum," *id.*, unless that federal interest can be specifically identified to an element of one of the asserted state-law claims.

Indeed, since this Court's decision in *Grable,* the lower courts have read it to preclude the kind of wooden formalism practiced by the court below. In *Municipality of San Juan v. Corporacion para el Fomento Economico de la Ciudad Capital*, 415 F.3d 145 (1st Cir. 2005), for example, the First Circuit cited *Grable* and found substantial federal question jurisdiction because "the propriety of [the defendant's] conduct turns entirely on its adherence to the intricate and detailed set of federal regulatory requirements, and the funds at issue are federal grant monies." *Id.* at 148 n.6. In *Wisconsin*

---

[2] Given the Fourth Circuit's extensive efforts to distinguish *Ormet* in the opinion below, *see* Pet. App. 22a-25a, it is hard to argue that reconsideration in light of *Grable* would not affect the result here. If even one member of the majority below finds the panel opinion's treatment of *Ormet* no longer sustainable in light of *Grable*, the result would change.

v. Alpon Laboratories, No. 02-C-408-C, 2002 U.S. Dist. LEXIS 23013 (W.D. Wis. Sept. 25, 2002)," the District Court for the Western District of Wisconsin interpreted Chapin as stating that law, and found that a state attorney general seeking recovery of state Medicaid overpayments based a substantial federal question because the issue of what constituted an "overpayment" was intertwined with federal regulations establishing the "average wholesale price" that could be charged for a particular drug. See 2002 U.S. Dist. LEXIS 23013, at *34-35.[3] In Bacon v. KPMG LLP, No. 02-8012, 2002 U.S. Dist. LEXIS 17302 (W.D. Ark. June 21, 2002), the District Court for the Western District of Arkansas cited Chapin and found substantial federal question jurisdiction over an action for fraud, conspiracy, and breach of fiduciary duty because the underlying investment products owed their existence to federal law. In none of these cases would subject matter jurisdiction have existed under the "essential element" test adopted by the panel majority. Because it applied a test that is inconsistent with this Court's intervening decision in Chapin, the Court should vacate the petition, recall the judgment, and remand for reconsideration in light of Chapin.

II. UNDER CHAPIN, SEVERAL SUBSTANTIAL FEDERAL QUESTIONS ARE EMBEDDED IN THESE COMPLAINTS.

A. Reconsideration In Light Of Chapin Will Change The Jurisdictional Outcome.

Given the numerous connections between Respondents' complaints and the FCC's RF safety and testing regulations,

---

[3] Alpon Laboratories found a substantial federal question per normative test declined jurisdiction on homestead grounds because the Medicaid program is primarily administered by the States. See 2002 U.S. Dist. LEXIS 23013, at *32-36. That rationale is clearly not applicable here. Even the primacy of federal regulation of the radio waves

there should be little direction that a "contextual enquiry" of the kind mandated by Carlyle should lead to a different result. Contrary to Respondents' suggestion, see Opp. at 4-5, many of these connections are evident from the face of the relevant complaints. The complaints allege that "[t]he specifications of the patent and circuitry" – in other words, the technical specifications of the phones Respondents allege to be defective – "are determined by the Cell Phone Carrier's license and frequency information given by the FCC." Per App. 153a. The complaints allege that the process by which calls are transferred across a wireless network, a process that necessarily relates to the RF emission levels of wireless phones, is "[p]ased upon the license given by the FCC." Id. The complaints further allege that the defendants issued a report that "stated that cell phones fell within the safety standards of the Federal Communications Commission (FCC)." Id. 158a. The complaint discusses at length "[t]he FDA's 'Update on Mobile Phones.'" Id. 131a-134a. To suggest, as Respondents do, that "nothing on the face of the complaints" in these tort actions would suggest the existence of a substantial federal question, Opp. at 4, runs counter to a substantial body of the complaints themselves.

While the express text of the complaints reveals numerous connections between Respondents' claims and the federal RF safety and testing regulatory regime, a "contextual enquiry" reveals even more fundamental links. Without mentioning federal law, for example, the complaints allege that Petitioners "operate[d] and exercise[d] dominance and control over the American National Standards Institute ("ANSI"). Committee responsible for developing safety standards for RFR emitting devices." Per. App. 152a. Yet the ANSI standard Respondents challenge as inadequate are the very standards adopted by the FCC in its RF emissions regulation. See 47 C.F.R. § 2.1091(d) ("The limits to be used for evaluation are based generally on criteria published by the American National Standards Institute (ANSI) for localized

specific absorption rate ("SAR") . . . ." The mere fact that the complaint neglected to mention the fact that the challenged ANSI standard does the status of federal law cannot change the fact that Respondent's allegations raise a substantial federal question." This is nothing more or less than a claim of "grand nbon the agency" ονει which federal jurisdiction is obvious. See Bachman Co. v. Plaintiff, Legal Comm., 231 U.S. 341 (1001).

Similarly, the complaint allege that Petitioners "fail[ed] to fulfill their ongoing obligation to conduct adequate testing" for potential RF-related health effects. Per. App. 191a. Yet the requirement that *writers* bpones pe tested for RF emissions is created by the same FCC regulation. See 47 C.F.R. § 2.1093. Again, Respondents' omission of specific references to federal law in the text of their complaints is not controlling.

The substantial connection between Respondents' complaints and the FCC safety and testing regulatory regime is further underscored by the similarity between the complaints' allegations and the matters resolved in *two* federal Hobbs Act challenges to the FCC's RF rulemaking proceeding. In one of those proceedings, for example, the petitioners argued that the FCC did not sufficiently consider "non-thermal" effects of RF energy. The Second Circuit rejected that contention, holding that the ANSI standard *was* properly adopted by the FCC. See Cellular Phone Taskforce v. FCC, 205 F.3d 82, 90 (2d Cir. 2000). In the other proceeding, the petitioners argued that the FCC failed to consider information allegedly suggesting that "cell bpone radiation might bromote cancer" – another allegation directly connected to Respondents' allegations here – but the District of Columbia

---

" Respondents' challenge to the ANSI standard that forms the basis for the FCC's RF emissions regulation is central to the entire case. See Per. App. 152a-158a.

Circuit rejected that contention, again affirming the validity of the FCC's regulation. *See EMA Network v. FCC*, 391 F.3d 505, 514 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2552 (2005). The municipalities petitioned the commission here and the Hobbs Act proceedings challenging the FCC's RE safety and testing regulations three dissenting Senior Judge Kiser's jurisdictional point. These actions are a disguised challenge to federal regulations, and amount to a third attempt to seek judicial review of a federal rulemaking proceeding. There is an important federal interest in prevailing such actions decided in federal court.[2]

Respondents' explanation for why these connections between their complaints and the exclusive FCC safety and testing regulatory regime are somehow insufficient to confer supplemental federal question jurisdiction is that the connections are not all specifically enumerated on the face of their complaints. According to Respondents, the "well-pleaded complaint" rule dictates that a plaintiff may avoid federal jurisdiction simply by omitting the language of federal law from the complaint. *See* Opp. at 12-18. Yet the supplemental federal question doctrine is an "exception to the well-pleaded complaint rule." *Shuter Health v. Unite Here*, No. 3:05-CV-1081, 2005 U.S. Dist. LEXIS 30895, at *18-19 (E.D. Cal. Aug. 10, 2005); *Bonita v. Carmichael*, No. CS-03-144, 2003 TAE Partorino Winery v. Duke Energy Trading & Mktg., L.L.C., 368 F. Supp. 2d 1340, 1348 (S.D. Ga. 2005); *Jackson v. Pharma Pharm Co.*, No. 8:05-cv-1458, 2005 U.S.

---

[2] Respondents misconstrue the significance of Cellular Phone Taxpayers and EMA Network, suggesting that the "preclusive effect" of the judgments in those cases is a defense that can be presented in state court. Opp. at 18 n.7. The significance of those decisions is not that they are preclusive of Respondents' claims, but that the identity of issues involved demonstrates both that the four cases at issue here involve substantial federal questions and that there is a strong federal interest in preserving those questions resolved in federal court.

Dist. LEXIS 9998, at *10 (M.D. Fla. April 11, 2003). It thus cannot be thwarted by mere drafting tactics on the part of a given plaintiff.

In sum, there is every reason to believe that the court of appeals would reach a different interpretation conclusion if it applied the "contextual emphasis" standard of Chaple rather than the "essential element" standard originally applied below. Correction action therefore is warranted in these cases low.

A. Corrective Action Is Necessary to Avoid Propagation of the Panel's Error in the Fourth Circuit

Regardless of whether the outcome in the court of appeals would be different on remand in this particular case, the fact remains that the court of appeals has articulated an "essential element" test that, while inconsistent with Chaple, is nonetheless binding law in the Fourth Circuit. Cf. Holman v. Hunt, 138 F.3d 252, 254 (4th Cir. 1998) (noting that decision of one Fourth Circuit panel is binding on subsequent circuit panels). It is not uncommon for circuit panels to adhere to their prior dispositions following an order granting certiorari and vacating the judgment in light of intervening precedent from this Court. But even if the court were to adhere to its original disposition upon reconsideration, its analysis would necessarily be quite different in light of Chaple's redirection of a "contextual emphasis." For the benefit of future Fourth Circuit panels that will confront cases involving the substantial federal question doctrine, this Court should grant the petition, vacate the judgment, and remand for reconsideration in light of Chaple.

CONCLUSION

The Court should grant the writ of certiorari, vacate the judgment, and remand the case for reconsideration in light of Chaple.

Respectfully submitted,

JOHN H. BEISNER
Counsel of Record
BRIAN P. BROOKS
SARAH A. GOLDFARM
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

ANDREW C. MCBRIDE
HEIDI C. WALKER
KATHRYN COMERFORD TODD
JOSHUA S. TURNER
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000

Counsel for Petitioners Calico
Partnership, d/b/a Veritom Manu-
facturing, Inc., and Veritom Communi-
cations Inc.

Counsel for ZANTO North America Corporation and
Mainstream Electrical Corporation of America

H. MICHAEL O'BRIEN
JASON P. SULTZER
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
3 Gannett Drive
White Plains, NY 10604
(914) 323-7000

PAUL D. KRAUSE
LAURA M. STEEL
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
1341 G Street, NW, Suite 200
Washington, DC 20012
(202) 628-1000

Counsel for SBC Communications, Inc.

SEAMUS C. DUFFY
CHRISTOPHER M. ARADA
DRINKER BIDDLE & REATH LLP
One Logan Square
18th & Cherry Streets
Philadelphia, PA 19103
(215) 988-2700

KENNETH S. GELLER
DAVID M. GOSSETT
MAYER, BROWN, ROWE
& MAW LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

EUGENE A. SCHOON
TAMARA B. KELBER
SIDLEY AUSTIN BROWN
& WOOD LLP
Bank One Plaza
10 S. Dearborn
Chicago, IL 60603
312-853-7000
Counsel for T-Mobile USA, Inc.

Pometrel, Inc., Pometrel
Atlantic, Inc. and Pometrel PCS
Inc.

DANIEL S. KEINHARDT
STEVEN L. HEWITSON
TROUTMAN SANDERS LLP
2500 Bank of America Plaza
600 Peachtree Street, NE
Atlanta, GA 30308
(404) 885-3000
Counsel for Sonopetra
Communications Services, Inc.

FRANCIS A. CITERA
GREENBERG TRAURIG, LLP
77 West Wacker Drive
Suite 2500
Chicago, IL 60601
(312) 456-8413
Counsel for Sony Electronics
Inc.

JOHN L. MACIE III
BODIE, MACIE, DOLINA, SMITH
& HOBBS, P.A.
31 W. Pseudonymous Avenue
Towson, MD 21504
(410) 853-1520
Counsel for Communications
Electronics, Inc.

MAUREEN E. MULPHY
MULPHY & MULPHY, L.L.C.
14 North Rollins Road
Catonsville, MD 21228
(410) 744-1967
Counsel for Baltimore Business
Communications, Inc.

CHARLES L. PERRY
ANDREWS KURTH LLP
1717 Main Street, Suite 3700
Dallas, TX 75201
(214) 659-4681
Counsel for Cellular One
Group

Robert B. Green
Irwin Green & Dexter, LLP.
301 W. Pennsylvania Avenue
Towson, MD 21504
(410) 825-0111

Association
Telecommunications & Internet
Counsel for Cellular

Paul H. Vishny
Paul E. Freehling
Seyfarth Shaw LLP
55 East Monroe Street
Suite 4500
Chicago, IL 60603
(315) 348-8000

Association
Telecommunications Industry
Counsel for

Kevin B. Getzendanner
Matthew T. Covell
Arnall Golden Gregory,
LLP
171 17th Street NW
Atlanta, GA 30363
(404) 873-8200
Counsel for Mississippi Wire-
less Communications, Inc.

John B. Isbister
Harold M. Walter
Tydings & Rosenberg LLP
100 East Pratt Street, Suite 2600
Baltimore, MD 21202
(410) 752-9700

Electronics America, Inc.
Counsel for Samsung

L. Stan Sexton
Douglas S. Beck
Shook, Hardy & Bacon, LLP
5222 Grand Blvd.
Kansas City, MO 64108
(816) 474-6550
Counsel for Sprint Spectrum
L.P.